A

METRAMAC CORPORATION SDN BHD

v.

FAWZIAH HOLDINGS SDN BHD; TAN SRI HALIM SAAD & CHE ABDUL DAIM HJ ZAINUDDIN (INTERVENERS)

B

FEDERAL COURT, PUTRAJAYA
AHMAD FAIRUZ CJ
RICHARD MALANJUM CJ SABAH & SARAWAK
C ABDUL HAMID MOHAMAD FCJ
ALAUDDIN MOHD SHERIFF FCJ
NIK HASHIM FCJ
[CIVIL APPEALS NOS: 02-19-2006(W) & 02-20-2006 (W)
19 JULY 2007

D

CONTRACT: *Breach - Damages - Compensation - Whether compensation unreasonably high and extortionate in nature - Whether a penalty - Whether not genuine estimate of damage likely to be suffered for breach thereof - Whether only entitled to damages to be assessed -*
E *Sum named in contract - Intention of parties - Contracts Act 1950 s. 75*

CONTRACT: *Formation - Prerequisites - Element of certainty - Payment to respondent of income earned by appellant under "future contracts" - Whether ambiguous - Whether lacking consideration -*
F *Whether void for uncertainty - Contracts Act 1950 s. 30*

CIVIL PROCEDURE: *Judgment - Adjudicative independence of judges - Duty to render impartial decisions - Court of Appeal - Making adverse remarks on conduct of third parties and holding appellant beneficiary of such conduct - Whether remarks and findings baseless - Whether turning*
G *private claim for breach of contract into public interest litigation - Whether real danger of bias apparent in judgment - Whether judgment to be set aside*

CIVIL PROCEDURE: *Judgment - Written judgment - Court of*
H *Appeal - Expunction of contents of judgment - Applicable test - Whether remarks and findings offensive and unwarranted - Persons rebuked not parties or witnesss to suit - Whether comments unfair - Whether to be expunged*

I

TRUSTS: *Express trust - Requirements - Whether satisfied - Allegation that appellant holding money on trust for benefit of respondent - Confusion as to what respondent was claiming under purported trust - Whether void for uncertainty - Whether amounting to illegal reduction of appellant's share capital - Companies Act 1965 ss. 64, 365(1)*

Syarikat Teratai KG Sdn Bhd ('STKG') and the respondent in this case shared common shareholders and directors in the persons of Dato' Fawziah and her mother, Maimoon Bee. In 1986, STKG secured a contract from Dewan Bandaraya Kuala Lumpur ('DBKL') to construct certain roads in Kuala Lumpur and to collect toll thereat for a period of 12 years ('the concession'). STKG signed with DBKL the First Concession Agreement herein, and pursuant thereto a Licence Agreement granting it exclusive rights to erect advertisements and signage within the concession area and period ('advertising right'). To undertake the concession project, STKG further: (i) signed a Restructure Sale Agreement with the respondent agreeing to sub-license the advertising right to the respondent, and secondly, by cls. 9 & 10 thereof, to sub-contract all contracts and future contracts to the respondent or otherwise to hold any monies, profits and benefits derived therefrom on trust for the benefit of the respondent; and (ii) courted in new shareholders to its fold, raised a capital of RM65 million therefrom and took a loan of RM204 million from the banks.

In 1990 STKG completed the Cheras section of the concession, but was forced by DBKL to suspend toll collections due to public demonstrations against the same. Thereupon STKG sought a RM764-million compensation from DBKL, and even approached the then Finance Minister, Tun Daim Zainuddin for the purpose, but the effort proved futile. Be that as it may, on 2 November 1990, as agreed on in the Restructure Sale Agreement, STKG signed a Signage Sub-License Agreement with the respondent granting it the advertisement right for a yearly fee of RM1000. This agreement also provided that in the event that the agreement is terminated, STKG would compensate the respondent for its loss of potential revenue of RM7,797,000 per year thereunder, albeit in accordance with the formula as set out in cl. 8.2 ('cl. 8 formula'), and further admit of a debt payable to the respondent (cl. 8.3). Thereafter, STKG received and accepted an offer from one UEM to purchase its shares for RM97.5 million. However, before the formal takeover deal was executed, STKG signed a

A Signage Sub-Licence Amending Agreement with the respondent amending the triggering point for a claim to arise under the cl. 8 formula to include the mutual termination of the First Concession Agreement or the termination of the Signage Sub-Licence Agreement by STKG.

B

On 23 January 1991, an agreement was executed on the sales of STKG shares to Metro Juara Bhd, a nominee of UEM owned by one Anuar Othman and Dato Halim Saad, whereupon STKG assumed its present name, Metramac Corporation Sdn Bhd (the C appellant). Having taken over the appellant, the new owners, however, terminated the First Concession Agreement and replaced it with a Replacement Concession Agreement, rescinded the Signage Sub-Licence Agreement and the Signage Sub-Licence Amending Agreement and assigned the advertising right to some D third parties. It was also evident that, a few months later, on account of the termination the First Concession Agreement, a sum of RM405 million (eventually RM756.7 million) was paid by DBKL to the appellant. The respondent alleged that the acts of the new owners constituted breach of contract and trust, and in the E circumstances applied to the High Court *inter alia* for the following orders, namely: (i) damages for breach of the advertising right or alternatively damages in the sum of RM65,182,920 for breach of the Signage Sub-Licence Agreement; and (ii) a declaration that the appellant was holding the RM405 million and other sums received F from DBKL on trust for the respondent pursuant to cls. 9 & 10 of the Restructure Sale Agreement. The appellant denied the allegations, and in any case counter-claimed that the agreements were null and void and of no effect. The learned judge held that: (i) the appellant was liable for breach of the contract for the G advertising right; (ii) the sum of RM65,182,920 calculated pursuant to cl. 8 formula was a penalty that contravened s. 75 of the Contracts Act 1950 ('Contracts Act'), such that the respondent was only entitled to be paid damages to be assessed; (iii) the claim for loss of profits, monies or other benefits arising H from 'future contracts' pursuant to cls. 9 & 10 of the Restructure Sale Agreement was void for uncertainty under s. 30 of the Contracts Act and for lack of consideration, and therefore no question of a trust account under the said agreement could arise; and (iv) the counterclaim of the appellant should also be dismissed. I Dissatisfied, both parties appealed.

The Court of Appeal, *vide* the judgments of his lordship Gopal Sri Ram JCA, with which his lordship Hashim Yusoff JCA was in agreement ('main judgment'), and of his lordship Zulkefli Makinudin JCA ('supplementary judgment'), ruled that s. 75 of the Contracts Act did not apply as the cl. 8 formula is not a penalty, that that section had no application to an action for a simple debt like the respondent's claim, that cl. 9.5 of the Restructure Sale Agreement had in law created an express trust and that s. 30 of the Contracts Act 1950 did not apply to the facts and circumstances of this case. The intermediate appellate court hence dismissed the appellant's appeal, affirmed the High Court's finding of liability in respect of the claim for loss of advertising right and allowed the respondent's claim for the sum of RM65,182,920 as loss of profits derived from future contracts. The facts further showed, however, that, upon the evidence before it, the Court of Appeal deemed it appropriate to rebuke certain personalities who were not parties to this suit, including Tun Daim Zainuddin and Dato Halim Saad, the interveners herein. Among others, the main judgment remarked: (i) "so why pay RM97.5 million for the shares of such a company? The answer is simple enough. Anuar Othman dan Dato Halim Saad had something which the plaintiff did not. And that was the patronage of the then Minister of Finance, Tun Daim Zainuddin"; (ii) "I think it is a fair question to ask why taxpayers' money was channelled into the hands of two private individuals – to profit them – instead of a wider section of the general public. It is not at all clear why the Minister of Finance used his power to favour Anuar Othman and Dato Halim Saad"; (iii) "for the sake of completeness, it must be mentioned that the RM32.5 million mentioned earlier was siphoned out of the defendant's account by Anuar Othman and Dato Halim Saad"; (iv) "in this context, it is clearly wrong to treat even a private limited company with only two shareholders any different from any other company. An intentional misappropriation of such a company's property, movable or immovable, is a criminal breach of trust within s. 405 of the Penal Code and, if the misappropriation is done by directors, as was the case here, it is the aggravated form of criminal breach of trust under s. 409"; and (v) "they are the ones who, with the support of Tun Daim, oppressed the previous shareholders into parting with their shares. They are the one ones who took advantage of the ideas of Dato' Fauziah and used it for their own benefit and obtained huge payments from DBKL and the Federal Government".

A Aggrieved, the appellant applied for and was granted leave to appeal on the following questions, namely: (i) whether the creation of a trust by a company amounts to an illegal reduction of its capital; (ii) whether the test adopted by the Court of Appeal in determining whether cl. 8 of the Signage Agreement is a stipulation
B by way of a penalty and/or a sum named in the contract for the purpose of s. 75 of the Contracts Act is the correct test and/or is exhaustive; and (iii) whether the Court of Appeal's adverse remarks/findings in the circumstances of this case, when viewed objectively, shows a real danger of bias on the part of the Court
C of Appeal in the judgment arrived at against the appellant. The interveners too were given leave to apply to expunge the adverse remarks of the Court of Appeal aforesaid, *albeit* in different and separate applications, and in the event, an additional question arose as to whether the remarks were offensive, unfair and
D unwarranted and ought to be expunged from the record.

Held (allowing partially the appeal and applications):
Per Richard Malanjum CJ Sabah & Sarawak (delivering the judgment of the court in respect of the posers by the
E **appellant)**

(1) The crucial point in determining the presence of bias is to objectively enquire whether the facts and circumstances asserted to be evidence of bias affirmatively answer the test
F for real danger of bias. In other words, the question is "whether the allegation and the factual circumstance could have caused a fair-minded and informed bystander to entertain a fear of real danger of bias" (*Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors*).
G (paras 70 & 72)

(2) The nett effect of the remarks and findings of the Court of Appeal is that the actions or behaviour of those persons mentioned amounted to economic duress against the former shareholders of the appellant, patronage and abuse of
H governmental powers and positions for personal gains in complete disregard to taxpayers' money, misappropriation of funds bordering on criminal breach of trust and the making of wild allegations against the respondent. The evidence however showed that no one made any allegation that he or
I she was compelled by the situation to sell his or her shares in STKG, and no witness came to testify that the

suspension of the toll collections was engineered by the present shareholders of the appellant or by the then Minister of Finance in order to take over the business of the appellant. The correspondences exchanged also did not portray an abuser-victim situation. Likewise, the payments made by the Federal Government and DBKL were given with explanations, and not dished out without any accountability or at the whims and fancies of the then Minister of Finance as portrayed by the main judgment. The sum of RM97 million paid also far exceeded the initial sum of RM65 million invested by the previous shareholders. In any event, Dato' Fawziah, her mother and the previous shareholders then had an alternative cause of action open to them to seek legal remedy and was not obliged to accept the offer. Consequently, they could not be said to be under economic duress at the time of sale. (paras 86 & 90)

(3) Reading objectively the main and the supplementary judgments, one cannot avoid the sense that, at the outset, the learned judges had the preconceived minds that the primary issue was about the powerful taking advantage over the weak. They seemed to believe without due regard to the evidence that there was an arrangement concluded between the present shareholders of the appellant and the then Finance Minister on behalf of the Federal Government and DBKL to ensure that the appellant would profit from the acquisition of the shares from the previous shareholders of the appellant. With respect, the Court of Appeal went on a frolic of its own. It was also obviously a case of striking at those persons who had no opportunity to defend themselves under the cover of judicial performance. Consequently, a plain private claim for breaches of contract and express trust was turned into a kind of public interest litigation without much push from the respondent. (paras 91, 92 & 93)

(3a) Clearly, there was no basis for the Court of Appeal to make the remarks and findings that there was economic duress, patronage, abuse of governmental positions and powers in complete disregard to taxpayers' money and misappropriation of funds. Further, gleaned from the exceptionally strong and emotive language used, particularly in the main judgment, a reasonable person would be persuaded to conclude that "there was a real danger of bias on the part of the relevant

members of the Court of Appeal, even though unintentionally, in the sense that they might unfairly regard or have unfairly regarded with disfavour the case of the appellant". It follows that the decision and judgments of the Court of Appeal cannot stand the test of real danger of bias. Consequently, we would answer Question (iii) as posed in the affirmative and set aside the decision and judgments of the Court of Appeal. (paras 94, 98 & 101)

(4) The learned High Court judge was correct in his summation that in failing to honour its obligation under the Signage Sub-Licence Agreement, the appellant had committed a breach to which the respondent would be entitled to claim damages. The learned judge's finding in this respect is hence affirmed. We would nonetheless agree with the approach adopted by the learned judge in the main judgment of the Court of Appeal in that the contract in issue should be the Signage Sub-Licence Agreement as amended, and not the Signage Sub-Licence Agreement upon which the High Court judge premised his finding of liability against the appellant. However, since the effect of the amendment only related to the triggering point, his finding on liability should not be affected. The remaining issue therefore is whether the damages computed in accordance with the cl. 8 formula is caught by s. 75 of the Contracts Act. (paras 106, 108 & 118)

(5) The mere use of a formula in calculating the sum payable does not necessarily mean that it can never be a 'sum named in a contract' for the purposes of s. 75 of the Contracts Act. It is a matter of construction and depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if the intention is to assess damages for breach of the contract, it is liquidated damages" (*Law v. Redditch Local Board*). (para 122)

(5a) Considering cl. 8 objectively as a whole, the learned judge was correct in holding that, applying s. 75, the clause is a penalty in that it constitutes a threat held against the appellant to perform the contract and not a genuine pre-estimate of the damage likely to be suffered by the

respondent in the event of a breach. Further, the usage of the phrase "a debt shall arise as calculated in accordance with clause 8.2 and the debt shall be payable by STKG as a result of the cancellation of this Agreement" does not *ipso facto* rule out the probability that the sum payable can be a 'sum named in the contract' for the purposes of s. 75 of the Contracts Act. Accordingly, we are in agreement with the conclusion by the learned High Court judge that "there shall be an order that damages be assessed in respect of the loss suffered". In the circumstances, whilst we do not have to answer Question (ii) in its original text in view of our answer to Question (iii), the answer, if we have to, would have to be in the negative with the result that the respondent would not be able to claim the sum computed in accordance with the cl. 8 formula. (paras 120, 124, 126, 127, 128 & 147)

(6) As to question (i), the issue before the High Court was on the claim and payment of income earned on "future contracts" premised on cls. 9 & 10 of the Restructure Sale Agreement, whereof the High Court held that the agreement was void for uncertainty as it did not meet the requirement of s. 30 of the Contracts Act, with the result it was no longer relevant to decide on the obligations of the appellant under the Trust Account spelt out in cl. 10 thereof. This finding as it were was reversed by the Court of Appeal. (paras 129 & 132)

(6a) Although the learned High Court judge might have erred in applying s. 30 of the Contracts Act when considering cls. 9 & 10 of the Restructure Sale Agreement, we are of the view in the same way as the Court of Appeal that determining the elements of certainty in the purported trust created by those clauses is still necessary. Essentially, therefore, it is an exercise to determine whether all the three elements of certainties in the creation of an express trust, namely intention, subject matter and object, are present. (para 136)

(7) It is the pleaded case of the respondent that the Replacement Concession Agreement is a replacement of the First Concession Agreement. If that be so, there is merit in the submission that projects or works relating to it could be excluded due to the definition of "future contracts" as given.

A As the subject matter of the intended trust are the "future contracts" but that the projects or works relating to the Replacement Concession Agreement are not within the definition of "future contracts", it follows that there is no question of the Replacement Concession Agreement being
B the subject matter of the trust upon which the respondent premised its claim against the appellant. Accordingly, the learned High Court judge was right in concluding that there was no basis for the claim under cl. 9 of the Restructure Sale Agreement. (paras 139 & 141)

C

(7a) There is confusion as to what actually the respondent was claiming under the purported express trust. If indeed the Replacement Concession Agreement is within the definition of "future contracts", then there is merit to say that the
D appellant not only would be obliged to subcontract to the respondent all the projects and works under the Replacement Concession Agreement but it would also be holding on trust all profits and monies received by it in relation to the Replacement Concession Agreement. That
E however makes no business sense at all. It would tantamount to the appellant spending its own capital to generate incomes only to be subject to an express trust in favour of the respondent. There is therefore ambiguity in the subject matter of the purported express trust intended under
F cl 9.5 of the Restructure Sale Agreement and it is thus void for uncertainty. For the above reasons, it is unnecessary to answer Question 1. (paras 143 & 145)

(7b) At any rate, accepting the argument that the Replacement
G Concession Agreement comes within the definition of "future contracts", the purported express trust would obviously be a scheme that would amount to an illegal reduction of the share capital of the appellant without the court's sanction and the payment of profits without declaring any dividend.
H Sections 64 and 365(1) of the Companies Act 1965 as amended make clear the prohibitions and the prerequisites and are thus relevant. Hence, if at all, our answer to Question 1 on the facts and in the circumstances would be in the affirmative. It follows that the claim pursuant to
I cls. 9 & 10 of the Restructure Sale Agreement is dismissed. (paras 146 & 147)

Per Abdul Hamid Mohamad FCJ (delivering the judgment of the court in respect of the applications by the interveners):

(1) The sensible approach for this court to take is to first consider whether the statements on the face of it are offensive, objectionable, disparaging, unjust, unjustified and so on, and if so, to consider: (i) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (ii) whether there is evidence on record bearing on that conduct justifying the remarks; and (iii) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert to that conduct. (*State of Uttar Pradesh v. Mohd Naim*). (paras 164 & 165)

(2) We have before us a case where the unwarranted and disparaging statements were made by the learned judge in his judgment where Tun Daim was neither a party nor a witness; where he had no opportunity whatsoever to explain or defend himself; where there was no cogent evidence on record to support such statements; where he was neither referred to in the pleadings nor in the judgment of the trial judge; where in the notes of evidence of the trial judge even though his name was mentioned it was inconsequential and where such comments are altogether unnecessary for the learned judge to decide the case, even to arrive at the same conclusion he did. Reading those parts of the judgment objected to, there is no doubt that at least some of them are unwarranted and objectionable and this applies as well to Tan Sri Halim Saad's application. Accordingly, the relevant offensive statements that formed part of the main judgment and embodied as it were in paras 13, 16, 17, 18 and 34 of the judgment should be expunged from the records. No part of the supplementary judgment however needs be expunged (paras 169, 170, 171, 172 & 173)

(3) What happened here was that the learned judge made the objectionable statements on a frolic of his own, that the interveners had to intervene and incur expenses through no fault of theirs, and that Fawziah Holdings needed to object to the applications to intervene because it is an attack on a judgment in their favour. Hence, while it is unfair to the interveners that they have to bear their own costs of making

A the applications, it is also not fair that Fawziah Holdings should bear their own costs of defending the judgment, and even more unfair to ask them to bear the costs of the interveners. In the circumstances, the court would allow the applications but would make no order as to costs. (paras
B 175 & 177)

[Appeal and applications partly allowed. Order accordingly]

Bahasa Malaysian *translation of headnotes*

C Syarikat Teratai KG Sdn Bhd ('STKG') dan responden dalam kes ini mempunyai pemegang saham dan pengarah-pengarah yang sama iaitu Dato' Fawziah dan ibunya, Maimoon Bee. Pada tahun 1986, STKG memperoleh satu kontrak dari Dewan Bandaraya Kuala Lumpur ('DBKL') bagi membina beberapa jalanraya di
D Kuala Lumpur dan mengutip tol di situ selama 12 tahun ('konsesi'). STKG menandatangani dengan DBKL Perjanjian Konsesi Pertama di sini, dan di bawah itu suatu Perjanjian Pelesenan memberikan hak ekslusif kepada STKG untuk meletak iklan-iklan dan tanda-tanda jalan di kawasan dan dalam tempoh
E konsesi ('hak pengiklanan'). Bagi melaksanakan projek konsesi, STKG juga: (i) menandatangai suatu Perjanjian Penjualan Penstrukturan dengan responden sekaligus bersetuju untuk melesenkan hak pengiklanan kepada responden, dan kedua, melalui fasal 9 & 10 perjanjian, mengkontrakkan semua kontrak dan
F kontrak hadapan kepada responden ataupun sebaliknya memegang apa jua wang, keuntungan dan manfaat dari kontrak-kontrak tersebut sebagai amanah untuk manfaat responden; dan (ii) menarik pemegang-pemegang saham baru ke dalam syarikat, mendapat modal RM65 juta dari mereka dan membuat pinjaman
G bank berjumlah RM204 juta.

Pada tahun 1990 STKG menyiapkan konsesi di bahagian Cheras, namun dipaksa menangguhkan kutipan tol oleh DBKL disebabkan bantahan orang ramai terhadap kutipan tersebut. STKG cuba
H mendapatkan pampasan berjumlah RM764 juta dari DBKL, dan untuk itu telah berjumpa dengan Tun Daim Zainuddin, Menteri Kewangan ketika itu, namun usaha tersebut gagal. Apapun, pada 2 November 1990, seperti yang dijanjikan di dalam Perjanjian Penjualan Penstrukturan, STKG menandatangani suatu Perjanjian
I Pelesenan-Kecil Tandajalan dengan responden memberikan hak pengiklanan kepada responden dengan balasan fi RM1,000 setahun. Perjanjian ini juga memperuntukkan bahawa jika ianya

ditamatkan, maka STKG akan membayar pampasan kepada responden atas kehilangan jangkaan hasil RM7,797,000 di bawahnya, iaitu berdasarkan kepada formula yang tertera di fasal 8.2 perjanjian ('formula fasal 8'), dan seterusnya mengakui akan kewujudan suatu hutang yang perlu dibayar kepada responden (fasal 8.3). Berikutnya, STKG mendapat dan menerima tawaran yang dibuat oleh satu UEM untuk membeli saham-sahamnya dengan harga RM97.5 juta. Bagaimanapun, sebelum perjanjian pengambil-alihan formal mengenainya dimeterai, STKG menandatangani suatu Perjanjian Pemindaan Pelesenan-Kecil Tandajalan dengan responden meminda pembingkas (triggering point) untuk membangkitkan tuntutan di bawah formula fasal 8 bagi memasukkan sama faktor penamatan bersama Perjanjian Konsesi Pertama atau penamatan Perjanjian Pelesenan-Kecil Tandajalan oleh STKG.

Pada 23 Januari 1991, perjanjian dimeterai mengenai penjualan saham-saham STKG kepada Metro Juara Sdn Bhd, nomini UEM yang dimiliki oleh seorang Anuar Othman dan Dato Halim Saad, dan berikutnya STKG menukar namanya kepada Metramac Corporation Sdn Bhd (perayu). Bagaimanapun, setelah mengambilalih perayu, pemilik-pemilik baru telah menamatkan Perjanjian Konsesi Pertama dan menggantikannya dengan Perjanjian Penggantian Konsesi, membatalkan Perjanjian Pelesenan-Kecil Tandajalan dan Perjanjian Pemindaan Pelesenan-Kecil Tandajalan serta memberikan hak pengiklanan kepada pihak ketiga. Juga jelas bahawa, beberapa bulan kemudian, berasaskan kepada penamatan Perjanjian Konsesi Pertama, sejumlah RM405 juta (akhirnya RM756.7 juta) telah dibayar oleh DBKL kepada perayu. Responden mengatakan bahawa perbuatan-perbuatan pemilik baru perayu di atas merupakan suatu kemungkiran kontrak dan amanah, dan dengan itu telah memfail tuntutan di Mahkamah Tinggi antara lain untuk perintah-perintah berikut: (i) gantirugi kerana kemungkiran hak pengiklanan, atau secara alternatifnya gantirugi untuk jumlah RM65,182,920 kerana kemungkiran Perjanjian Pelesenan-Kecil Tandajalan; dan (ii) deklarasi bahawa perayu memegang RM405 juta di atas serta lain-lain imbuhan yang diterima dari DBKL sebagai amanah untuk responden berdasarkan Perjanjian Penjualan Penstrukturan. Perayu menolak alegasi dan apapun telah memplid tuntutan balas bahawa perjanjian-perjanjian adalah batal dan tidak sah dan tidak mempunyai kesan. Yang arif hakim memutuskan bahawa: (i) perayu bertanggungan kerana memungkiri kontrak hak pengiklanan; (ii) jumlah RM65,182,920

A yang diasas kepada formula fasal 8 adalah suatu penalti yang menyanggahi s. 75 Akta Kontrak 1950 ('Akta Kontrak'), berakibat responden hanya berhak kepada gantirugi ditaksir; (iii) tuntutan kehilangan keuntungan, pendapatan atau manfaat-manfaat lain yang berbangkit dari "kontrak hadapan" di bawah fasal-fasal 9 & 10
B Perjanjian Penjualan Penstrukturan adalah batal di bawah s. 30 Akta Kontrak kerana kekaburan dan kerana ketiadaan balasan, berakibat tiada persoalan mengenai akaun amanah di bawah perjanjian tersebut boleh berbangkit; dan (iv) tuntutan balas perayu adalah ditolak. Merasa tidak puashati, kedua-dua pihak telah
C merayu.

Mahkamah Rayuan, melalui penghakiman-penghakiman yang arif Gopal Sri Ram HMR, dengan mana yang arif Hashim Yusoff HMR telah bersetuju ('penghakiman utama'), dan penghakiman
D yang arif Zulkefli Makinudin HMR ('penghakiman tambahan'), memutuskan bahawa s. 75 Akta Kontrak adalah tidak terpakai oleh kerana formula fasal 8 bukan merupakan suatu penalti, bahawa seksyen tersebut tidak terpakai kepada tindakan untuk suatu hutang biasa seperti kes responden, bahawa fasal 9.5 Perjanjian
E Penjualan Penstrukturan telah mencetuskan suatu amanah expres di sisi undang-undang dan bahawa s. 30 Akta Kontrak tidak terpakai kepada fakta dan halkeadaan kes ini. Mahkamah Rayuan peringkat pertengahan dengan itu menolak rayuan perayu, mengesahkan dapatan liabiliti Mahkamah Tinggi mengenai tuntutan
F hak pengiklanan dan membenarkan tuntutan responden untuk jumlah RM65,182,920 atas dasar ianya merupakan kehilangan keuntungan dari kontrak hadapan. Fakta bagaimanapun menunjukkan bahawa, berdasarkan keterangan di hadapannya, Mahkamah Rayuan merasakan wajar untuk menempelak beberapa
G personaliti yang bukan merupakan pihak kepada guaman, termasuklah Tun Daim Zainuddin dan Dato Halim Saad, pencelah-pencelah di sini. Antara lain penghakiman utama menyatakan: (i) "oleh itu kenapa membayar RM97.5 juta untuk saham-saham syarikat sedemikian? Jawapannya mudah. Anuar Othman dan Dato
H Halim Saad mempunyai sesuatu yang tidak dimiliki oleh plaintif. Sesuatu itu adalah naungan Menteri Kewangan ketika itu, Tun Daim Zainuddin"; (ii) "saya fikir adalah satu soalan yang adil untuk bertanya kenapa wang pembayar cukai telah disalurkan kepada dua orang individu – bagi kemanfaatan mereka – dan tidak secara lebih
I meluas kepada masyarakat awam. Tidak jelas mengapa Menteri Kewangan telah menggunakan kuasanya untuk manfaat Anuar Othman dan Dato Halim Saad"; (iii) "untuk melengkapkan, harus

dinyatakan bahawa jumlah RM32.5 yang disebut sebelum ini telah dikeluarkan dari akaun defendan oleh Anuar Othman dan Dato Halim Saad"; (iv) "dalam konteks ini, adalah silap untuk melayan sebuah syarikat sendirian berhad yang mempunyai dua orang pemegang saham berbeza dari syarikat-syarikat lain. Perbuatan melesapkan dengan niat sebarang harta syarikat sedemikian, sama ada harta alih atau tak alih, adalah satu pecah amanah jenayah di bawah s. 405 Kanun Kesiksaan dan, jika pelesapan dilakukan oleh pengarah-pengarah, seperti halnya di sini, maka ia berbentuk pecah amanah jenayah yang lebih berat di bawah s. 409"; (v) "merekalah orangnya yang, dengan sokongan Tun Daim Zainuddin, menindas pemegang-pemegang saham terdahulu untuk melupuskan saham-saham mereka. Merekalah orangnya yang mengambil peluang atas idea-idea Dato' Fawziah dan menggunakannya untuk manfaat mereka dan memperoleh pembayaran besar dari DBKL dan Kerajaan Persekutuan".

Terkilan, perayu memohon dan memperoleh kebenaran untuk merayu atas persoalan-persoalan berikut, iaitu: (i) sama ada pembentukan suatu amanah oleh sebuah syarikat telah mengurangkan modalnya dengan secara tidak sah; (ii) sama ada ujian yang digunapakai Mahkamah Rayuan dalam menentukan sama ada fasal 8 Perjanjian Tandajalan merupakan suatu peruntukan penalti dan/atau suatu jumlah yang dinyatakan di dalam kontrak bagi maksud s. 75 Akta Kontrak adalah ujian yang betul dan/atau lengkap; dan (iii) sama ada ucapan/dapatan kurang baik oleh Mahkamah Rayuan dalam halkeadaan kes di sini, dilihat secara objektif, menunjukkan bahaya sebenar bias Mahkamah Rayuan dalam penghakimannya yang tidak memihak kepada perayu. Pencelah-pencelah juga telah diberi izin untuk memohon membuang kenyataan kurang baik Mahkamah Rayuan di atas, walaupun melalui dua permohonan yang berasingan, dan oleh itu, persoalan juga berbangkit sama ada ucapan bersifat menyerang, tidak adil dan tidak wajar dan harus dibuang dari rekod.

Diputuskan (membenarkan sebahagian rayuan dan permohonan) Oleh Richard Malanjum HB Sabah & Sarawak (menyampaikan penghakiman mahkamah berkaitan persoalan yang dibangkitkan perayu):

(1) Perkara pokok dalam menentukan kewujudan bias adalah dengan melihat secara objektif sama ada fakta dan halkeadaan yang dikatakan sebagai membuktikan bias itu menepati ujian bahaya sebenar bias. Dengan lain perkataan,

A soalannya adalah "sama ada alegasi dan halkeadaan faktual tersebut boleh menyebabkan seorang orang biasa yang berfikiran waras merasakan bahawa terdapat bahaya sebenar bias" *(Alor Janggus Soon Seng Sdn Bhd v. Sey Hoe Sdn Bhd & Ors)*.

B

(2) Kesan sebenar kenyataan dan dapatan-dapatan Mahkamah Rayuan adalah bahawa tindakan atau perilaku pihak-pihak yang disebutkan itu merupakan suatu penindasan ekonomi terhadap pemegang saham terdahulu perayu, penaungan dan
C salah guna kuasa-kuasa dan kedudukan kerajaan untuk manfaat peribadi tanpa mempedulikan wang pembayar cukai, pelesapan wang yang menghampiri pecah amanah jenayah dan pelemparan tuduhan-tuduhan liar terhadap responden. Keterangan bagaimana menunjukkan bahawa tiada siapa pun
D mengadu bahawa ia dipaksa oleh keadaan untuk menjualkan saham-sahamnya di dalam STKG, dan tiada saksi datang memberikan keterangan bahawa penggantungan pengutipan tol telah dirancang oleh pemegang saham semasa perayu ataupun oleh Menteri Kewangan ketika itu dengan tujuan
E untuk mengambilalih perniagaan perayu. Pertukaran surat-menyurat juga tidak menunjukkan wujudnya satu keadaan di antara pesalahguna kuasa dan mangsa. Begitu juga, bayaran-bayaran yang dibuat oleh Kerajaan Persekutuan dan DBKL adalah dibuat dengan penjelasan-penjelasan, dan bukanlah
F dibuat tanpa apa-apa perasaan tanggungjawab dan menurut hawa nafsu Menteri Kewangan ketika itu seperti yang digambarkan oleh penghakiman utama Mahkamah Rayuan. Jumlah RM97 yang dibayar juga jauh melebihi jumlah RM65 juta yang dilabur oleh pemegang-pemegang saham terdahulu.
G Apapun, pada waktu material, Dato' Fawziah dan ibunya serta pemegang-pemegang saham terdahulu boleh memilih untuk mendapatkan remedi undang-undang dan tidak berkewajipan untuk menerima tawaran. Mereka dengan itu tidak boleh dikatakan sebagai berada di bawah penindasan
H ekonomi semasa jualan dimeterai.

(3) Membaca secara objektif penghakiman utama dan penghakiman tambahan, seorang tidak dapat mengelak dari merasakan bahawa yang arif hakim-hakim, sejak dari awal-
I awal lagi, mempunyai pandangan bahawa isu utamanya adalah mengenai pihak yang kuat mengambil peluang ke atas yang lemah. Mereka kelihatannya percaya tanpa mempedulikan

keterangan bahawa terdapat suatu rancangan yang dibuat di antara pemegang-pemegang saham semasa perayu dengan Menteri Kewangan ketika itu yang mewakili Kerajaan Persekutuan dan DBKL untuk mempastikan bahawa perayu akan mendapat keuntungan dari pemerolehan saham-saham dari pemegang-pemegang saham terdahulu perayu. Dengan hormat, Mahkamah Rayuan telah 'terkeluar dari landasannya.'

(3a) Adalah jelas bahawa tidak terdapat asas yang membolehkan Mahkamah Rayuan membuat ucapan-ucapan dan dapatan-dapatan bahawa wujud penindasan ekonomi, penaungan, salahguna kuasa dan kedudukan dalam Kerajaan secara yang membelakangkan wang pembayar cukai serta pelesapan wang. Selanjutnya, melihat kepada ketajaman dan emosi bahasa yang digunakan, terutama di dalam penghakiman utama, seorang yang munasabah akan terdorong untuk merumus bahawa "terdapat bahaya sebenar bias di kalangan ahli-ahli Mahkamah Rayuan berkenaan, walaupun dengan tidak sengaja, dalam ertikata mereka mungkin melayani atau telah melayani kes perayu secara tidak menyukainya". Ianya mengikut bahawa keputusan dan penghakiman Mahkamah Rayuan tidak dapat melepasi ujian bahaya sebenar bias. Akibatnya, kami menjawab Soalan (iii) seperti yang dikemukakan secara afirmatif sekaligus mengenepikan keputusan dan penghakiman Mahkamah Rayuan.

(4) Yang arif hakim Mahkamah Tinggi betul dalam membuat rumusan bahawa atas kegagalan memenuhi obligasinya di bawah Perjanjian Pelesenan-Kecil Tandajalan, perayu telah melakukan kemungkiran kontrak sekaligus memberikan hak kepada responden untuk menuntut gantirugi. Oleh itu, dapatan yang arif hakim yang tersebut adalah disahkan. Apapun, kami bersetuju dengan pendekatan yang diambil oleh penghakiman utama Mahkamah Rayuan bahawa kontrak yang menjadi isu adalah Kontrak Pelesenan-Kecil Tandajalan terpinda, dan bukannya Kontrak Pelesenan-Kecil Tandajalan yang dijadikan asas liabiliti perayu oleh yang arif hakim. Bagaimanapun, oleh kerana kesan pindaan hanyalah berkaitan dengan pembingkas, dapatan liabilitinya adalah tidak terjejas. Oleh yang demikian, isu seterusnya adalah sama ada gantirugi yang dikira berdasarkan formula fasal 8 dirangkumi oleh s. 75 Akta Kontrak.

(5) Penggunaan formula semata-mata dalam mengira jumlah yang perlu dibayar tidak bermakna bahawa ianya tidak terjumlah sebagai "jumlah yang dinamakan di dalam kontrak" bagi maksud s. 75 Akta Kontrak. Ia adalah perkara tafsiran dan bergantung kepada niat pihak-pihak berdasarkan kontrak pada keseluruhannya. Jika niatnya adalah untuk mempastikan pelaksanaan kontrak melalui pengenaan denda atau penalti, maka jumlah yang disebut adalah suatu penalti; tetapi jika niatnya adalah untuk mentaksir gantirugi atas kemungkiran kontrak, maka ia adalah gantirugi jumlah tertentu.

(5a) Menimbang secara objektif fasal 8 pada keseluruhannya, yang arif hakim betul dalam memutuskan bahawa, menggunapakai s. 75, fasal tersebut adalah suatu penalti dalam ertikata ia merupakan suatu ancaman terhadap perayu untuk melaksanakan kontrak dan bukannya suatu pra-anggaran gantirugi yang mungkin akan dialami oleh responden jika berlaku kemungkiran. Selain itu, penggunaan perkataan "suatu hutang akan berbangkit seperti yang dikira mengikut fasal 8.2 dan hutang hendaklah dibayar oleh STKG akibat dari penamatan Perjanjian ini" tidaklah *ipso facto* mengenepikan sama sekali kemungkinan bahawa jumlah yang akan dibayar masih menjadi suatu "jumlah yang dinamakan di dalam kontrak" bagi maksud s. 75 Akta Kontrak. Oleh itu, kami bersetuju dengan konklusi yang arif hakim Mahkamah Tinggi bahawa "kerugian yang dialami hendaklah ditaksirkan". Dengan demikian, walaupun tiada keperluan untuk kami menjawab Soalan (ii) mengambilkira jawapan yang kami beri terhadap Soalan (iii), jawapannya, jika kami perlu juga menjawab, adalah dalam bentuk negatif, berakibat responden tidak boleh menuntut jumlah yang dikira menurut formula fasal 8.

(6) Berhubung dengan Soalan (i), isu di hadapan Mahkamah Tinggi adalah berkenaan tuntutan dan pembayaran pendapatan "kontrak hadapan" berdasarkan kepada fasal 9 & 10 Perjanjian Penjualan Penstrukturan, di mana Mahkamah Tinggi memutuskan bahawa perjanjian adalah batal kerana kekaburan disebabkan gagal memenuhi keperluan-keperluan s. 30 Akta Kontrak, berakibat ianya tidak lagi perlu bagi mahkamah memutuskan soal obligasi perayu di bawah akaun amanah yang tertera di dalam fasal 10. Dapatan ini sepertimana halnya telah diakas oleh Mahkamah Rayuan.

(6a) Walaupun yang arif hakim Mahkamah Tinggi mungkin khilaf dalam menggunakan s. 30 Akta Kontrak sewaktu mempertimbang fasal-fasal 9 & 10 Perjanjian Penjualan Penstrukturan, kami bersependapat dengan Mahkamah Rayuan bahawa menentukan elemen-elemen kepastian (certainty) di dalam amanah yang didakwa itu adalah masih perlu. Dengan itu, secara khusus, langkahnya adalah untuk menentukan sama ada ketiga-tiga elemen kepastian dalam pembentukan suatu amanah expres, iaitu kepastian pada niat, pada halperkara dan pada objek, wujud.

(7) Adalah menjadi kes responden yang diplidkan bahawa Perjanjian Penggantian Konsesi adalah untuk mengganti Perjanjian Konsesi Pertama. Jika begitu keadaannya, maka terdapat merit pada hujah bahawa projek-projek atau kerja-kerja berkaitan dengannya boleh diketepikan berdasarkan definasi "kontrak hadapan" seperti yang diberikan. Oleh kerana halperkara amanah yang diniatkan itu adalah "kontrak hadapan" manakala projek-projek atau kerja-kerja berkaitan dengan Perjanjian Penggantian Konsesi pula tidak termasuk ke dalam definasi "kontrak hadapan", maka ianya mengikut bahawa soalan Perjanjian Penggantian Konsesi menjadi halperkara amanah yang menjadi asas tuntutan responden adalah tidak berbangkit sama sekali. Oleh itu, yang arif hakim betul bilamana memutuskan bahawa tuntutan di bawah fasal 9 Perjanjian Penjualan Penstrukturan adalah tidak berasas.

(7a) Terdapat kekeliruan tentang apa sebenarnya yang dituntut oleh responden di bawah amanah expres yang didakwa. Jika benar bahawa Perjanjian Penggantian Konsesi termasuk di dalam tafsiran "kontrak hadapan", maka terdapat merit pada hujah bahawa perayu bukan sahaja bertanggungan untuk mengkontrakkan kepada responden kesemua projek dan kerja yang ada di bawah Perjanjian Penggantian Konsesi, tetapi juga memegang sebagai amanah kesemua keuntungan dan wang yang diterima olehnya bersabit dengan Perjanjian Penggantian Konsesi. Namun, ini langsung tidak masuk akal dari segi amalan perniagaan. Ia bermakna bahawa perayu akan membelanjakan biayanya sendiri untuk menghasilkan pendapatan-pendapatan sedangkan pendapatan-pendapatan tersebut adalah tertakluk kepada suatu amanah expres untuk manfaat responden. Oleh itu, wujud kekaburan pada

A halperkara amanah expres yang didakwakan di bawah fasal 9.5 Perjanjian Penjualan Penstrukturan sekaligus menjadikannya tak sah kerana tiada kepastian. Atas alasan-alasan ini, adalah tidak perlu untuk menjawab Soalan (i).

B **(7b)** Jika pun diterima bahawa Perjanjian Penggantian Konsesi adalah dirangkumi oleh tafsiran "kontrak hadapan", amanah expres yang didakwakan adalah merupakan suatu skim yang mengurangkan secara tidak sah pemegangan modal perayu tanpa kebenaran mahkamah serta suatu pembayaran
C keuntungan tanpa pengisytiharan dividen. Seksyen-seksyen 64 dan 365(1) Akta Syarikat 1965 seperti yang dipinda adalah jelas mengenai larangan dan syarat-syaratnya, dan adalah dengan itu relevan. Oleh yang demikian, jikapun perlu, jawapan kami kepada Soalan (i) adalah atas fakta dan
D halkeadaan yang wujud afirmatif. Ianya mengikut bahawa tuntutan di bawah fasal-fasal 9 & 10 Perjanjian Penjualan Penstrukturan adalah ditolak.

Oleh Abdul Hamid Mohamad HMP (menyampaikan penghakiman mahkamah berkaitan permohonan pencelah-
E **pencelah):**

(1) Pendekatan munasabah yang harus diambil oleh mahkamah ini adalah dengan terlebih dahulu menimbang sama ada ucapan-ucapan pada permukaannya adalah bersifat serangan,
F mencela, menghina, tidak adil, tidak berjustifikasi dan sebagainya, dan jika begitu, menimbang: (i) sama ada pihak yang kelakuannya dipersoalkan berada di hadapan mahkamah atau mempunyai peluang untuk memberi penjelasan ataupun mempertahankan diri; (ii) sama ada terdapat keterangan pada
G rekod mengenai kelakuan tersebut sekaligus menjustifikasikan ucapan; dan (iii) sama ada adalah perlu untuk keputusan kes, sebagai satu bahagiannya yang penting, bahawa ucapan tersebut dimuat ke dalam penghakiman. (*State of Uttar Pradesh v. Mohd Naim*).

H

(2) Yang ada di hadapan kami adalah suatu kes di mana ucapan-ucapan tidak wajar dan menghina telah dibuat oleh yang arif hakim dalam keputusannya di mana Tun Daim bukan merupakan suatu pihak atau seorang saksi; di mana beliau
I langsung tidak mempunyai peluang untuk membuat penjelasan ataupun membela dirinya; di mana tiada keterangan kukuh untuk menyokong ucapan-ucapan sedemikian; di mana nama

beliau tidak disebut di dalam pliding atau oleh hakim bicara; di mana di dalam nota keterangan hakim bicara, walaupun namanya disebut, ia tidak membangkitkan apa-apa konsekuen dan di mana komen-komen berkenaan adalah tidak penting untuk yang arif hakim membuat keputusan mahupun mencapai konklusi-konklusi yang dibuatnya. Membaca bahagian penghakiman yang dibantah, tidak ada keraguan bahawa sekurang-kurang sebahagian darinya adalah tidak wajar dan bersifat menghina dan ini terpakai sama kepada permohonan Tan Sri Halim Saad. Oleh yang demikian, ucapan-ucapan menghina yang menjadi sebahagian dari penghakiman utama dan yang terangkum ke dalam perenggan-peranggan 13, 16, 17, 18 dan 34 penghakiman utama hendaklah dibuang dari rekod. Selain dari itu, tiada bahagian dari penghakiman tambahan perlu dibuang.

(3) Apa yang berlaku di sini adalah bahawa yang arif hakim membuat kenyataan yang menghina atas kesukaannya sendiri, bahawa pencelah-pencelah terpaksa mencelah dan menanggung perbelanjaan walaupun mereka tidak melakukan apa-apa kesalahan, dan bahawa Fawziah Holdings perlu membuat bantahan kepada permohonan untuk mencelah disebabkan ia dibuat terhadap suatu penghakiman yang menyebelahi mereka. Oleh itu, sementara ianya memang tidak adil kepada pencelah-pencelah bahawa mereka perlu memikul sendiri kos permohonan mereka, ianya juga adalah tidak adil bahawa Fawziah Holdings harus menanggung kos untuk mempertahankan penghakiman, dan lebih tidak adil untuk meminta mereka menanggung kos pihak pencelah-pencelah. Dalam halkeadaan sedemikian, mahkamah membenarkan permohonan tetapi tidak akan membuat sebarang perintah mengenai kos.

Case(s) referred to:

Allied Capital Sdn Bhd v. Mohd Latiff Shah Mohd & Another Application [2004] 4 CLJ 350 FC ***(refd)***

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [2002] 4 CLJ 268 CA ***(refd)***

AM Mathur v. Pramod Kumar Gupta & Ors [1990] 2 SCC 533 ***(refd)***

Bahai v. Rashidian & Anor [1985] 3 All ER 385 ***(refd)***

Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61 FC ***(refd)***

Dato' Tan Heng Chew v. Tan Kim Hor [2006] 1 CLJ 577 FC ***(refd)***

Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC ***(refd)***

Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd [1914-15] All ER Rep 739 ***(refd)***

Franklin v. Minister of Town & Country Planning [1948] AC 87 ***(refd)***

Inner West London Coroner, ex parte Dallaglio [1994] 4 All ER 139 ***(refd)***

Insas Bhd & Anor v. Ayer Molek Rubber Co Bhd & Ors [1995] 3 CLJ 328 FC ***(refd)***

K: a Judicial Officer AIR [2001] SC 972 ***(refd)***

Law v. Redditch Local Board [1982] 1 QB 127 ***(refd)***

Linggi Plantations Ltd v. Jagatheesan [1972] 1 MLJ 89 ***(refd)***

Locabail (UK) Ltd v. Bayfield Properties Ltd & Anor [2000] 1 All ER 65 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor [1999] 3 CLJ 65 FC ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(refd)***

MGG Pillai v. Tan Chee Yionn [2002] 3 CLJ 577 FC ***(refd)***

Newacres Sdn Bhd v. Sri Alam Sdn Bhd [2000] 2 CLJ 833 FC ***(refd)***

Phileo Promenade Sdn Bhd & Anor v. Premier Modal (M) Sdn Bhd [2003] 1 CLJ 854 CA ***(refd)***

PK Achuthan v. State Bank of Travancore, Calicut AIR [1975] Ker 47 ***(refd)***

R v. Gough [1993] AC 646 ***(refd)***

R v. Valente [1985] 19 CRR 354 ***(refd)***

R Rama Chandran v. The Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

RDS v. The Queen 151 DLR (4th) 193 ***(refd)***

Reg v. Bow Street Magistrate, Ex p Pinochet (No 2) (HL (E)) [2000] 1 AC 119 ***(refd)***

Robophone Facilities Ltd v. Blank [1966] 1 WLR 1428 ***(refd)***

Scott v. Scott [1913] AC 417 ***(refd)***

SS Maniam v. The State Of Perak [1957] MLJ 75 ***(refd)***

State of Madhya Pradesh & Ors v. Nandlal Jaiswal & Ors [1987] 1 SCR1 ***(refd)***

State of Uttar Pradesh v. Mohd Naim [1964] AIR SC 703 ***(refd)***

State of West Bengal v. Babu Chakraborty AIR [2004] SC 2324 ***(refd)***

Sundram v. Arujunan & Anor [1994] 4 CLJ 300 SC ***(refd)***

T v. Secretary of State for the Home Department [1995] 1 WLR 545 ***(refd)***

V Sujatha v. State of Kerala & Ors [1994] Supp (3) SCC 436 ***(refd)***

Valente v. Her Majesty the Queen [1985] 2 SCR 673 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 64, 365(1)

Contracts Act 1950, ss. 30, 75

For the appellant - Dato' Muhammed Shafee Abdullah (S Sivaneindiren, Teh Eng Lay & Kaushalya Rajathurai with him); M/s Cheah Teh & Su
For the respondent - Dato' Dr Cyrus Das (Benjamin Dawson, Steven Thiru, Alvin Tang, Koh San Tee, David Mathew & Nor Aisyah Abu Bakar with him); M/s Noraisyah & Co
For the intervener (Tun Daim Zainuddin) - Dato' Cecil Abraham (Sunil Abraham with him); M/s Shearn Delamore & Co
For the intervener (Tan Sri Halim Saad) - Tommy Thomas (Alan Gomez (Jason Wee with him); M/s Tommy Thomas

Reported by WA Sharif

JUDGMENT

Richard Malanjum CJ (Sabah & Sarawak):

Introduction

[1] There are two matters before this court for our consideration. The first is an appeal by the appellant against the decision of the Court of Appeal delivered on 25 October 2005. The second is the respective applications by two Interveners to have certain findings and comments found in the two judgments of the Court of Appeal expunged on the grounds as contained in their respective affidavits.

[2] In respect of the appeal we have given leave to appeal on 27 March 2006 involving three questions posed for our determination, namely:

a. Whether the creation of a trust by a company amounts to an illegal reduction of its capital?

b. Whether the test adopted by the Court of Appeal, in determining whether cl. 8 of the Signage Agreement is a stipulation by way of a penalty and/or a sum named in the contract for purposes of s. 75 of the Contracts Act 1950, is the correct test and/or is exhaustive?

c. Whether the Court of Appeal's adverse remarks/findings in the circumstances of this case, when viewed objectively, shows a real danger of bias on the part of the Court of Appeal in the judgment arrived at against the appellant?

Leave to intervene was also granted to the interveners on 7 March 2006.

[3] This judgment will deal only with the first matter, that is, the appeal proper. A separate judgment will be delivered in respect of the second matter.

[4] At the outset of the hearing of the appeal proper learned counsel for the appellant intimated to us that he would proceed to deal first with the third question posed and to be followed by the first and second questions. Accordingly in this judgment we will adopt the same sequence. But to better understand the real issues involved in the questions posed it is imperative that we should first state the background facts and basis of the decisions of the courts below.

Background Facts

[5] The appellant was formerly known as Syarikat Teratai K.G. Sdn Bhd ('STKG'). It only changed its name to Metramac Corp Sdn Bhd ('Metramac') on 4 March 1991 after it was bought over by Metro Juara Sdn. Bhd. ('Metro Juara').

[6] STKG and Fawziah Holdings Sdn Bhd (the respondent in this appeal) at the material time shared common shareholders and directors, namely, Dato' Fawziah and her mother Maimoon Bee.

[7] In July 1986 Dato' Fawziah, through her company STKG, bid in an open tender called by Dewan Bandaraya Kuala Lumpur ('DBKL') to design, construct, finance and operate in the privatization of certain roads in the Kuala Lumpur area ('the concession area') and to collect the tolls for a period of 12 years. There were five other bidders including United Engineers Malaysia Berhad (UEM). STKG was at that time engaged in several other projects especially in the building of low cost flats in Kuala Lumpur and Seremban and other civil engineering works.

[8] STKG won the tender and signed the First Concession Agreement dated 20 November 1987 with DBKL (the First Concession Agreement). A material clause in the First Concession Agreement was the 'land rights' clause, out of which arose the licensing agreement for signage rights in favour of STKG. The signage rights refer to the advertising rights through signboards and billboards etc along the concession roads to be built by STKG in the concession area.

[9] The First Concession Agreement was in the nature of a build, operate and transfer agreement wherein upon the expiry of the concession period, the roads would revert back to DBKL. A

[10] It was also anticipated by DBKL that any company operating the First Concession Agreement area would be required to raise funds from potential investors for the project. B

[11] In order to assure investors that all funds invested would go into the project a separate company focused to do the project would be desirable. After being advised by its professional financial consultants, Schroder, STKG was restructured to hive off all its non-concession businesses so that it became a one project company. C

[12] Hence, on 31 March 1988, STKG and the respondent entered into a sale agreement dated 31 March 1988 (the Restructure Sale Agreement) wherein STKG disposed of all its current business activities, assets and liabilities to the respondent save for the new business activity pursuant to the First Concession Agreement. As stipulated in the Restructure Sale Agreement, this was done in view of the intended changes in the business to be carried out by STKG including its new business venture to be undertaken. D E

[13] Some of the pertinent terms in the Restructure Sale Agreement were thus: F

i. that several of STKG's assets, rights and liabilities were sold to the respondent;

ii. that STKG agreed to grant some benefits to the respondent which includes advertising rights under the First Concession Agreement throughout the concession period; G

iii. that it was also agreed that all contracts and future contracts obtained by STKG were to be subcontracted to the respondent and if they were not so subcontracted, any monies, profits and benefits from such contracts or future contracts were to be held by the STKG on trust for the benefit of the respondent. By cls. 9.4 and 9.5 STKG agreed to hold on trust for the respondent any 'future contracts' entered into by it. H I

[14] It is important to note that at the time of entering into the Restructure Sale Agreement, Dato' Fawziah and her mother were the only shareholders/directors of STKG. Nevertheless due disclosures were made and approvals were obtained from the shareholders in relation to the Restructure Sale Agreement.

[15] The Restructure Sale Agreement was amended by a Supplemental Sale Agreement dated 12 September 1988 (the Supplemental Sale Agreement).

[16] After the execution of the Restructure Sale Agreement and the Supplemental Sale Agreement thereto, in December 1988 four institutions and an individual invested in STKG with funds injected in the total sum of RM65 million. The new shareholders were the American International Assurance Ltd, Bank Pembangunan Malaysia, Tabung Haji Malaysia, Mitsui Construction and one Madam Itjih Nursalim from Indonesia. STKG thus ceased to be a family company.

[17] A formal Shareholders Agreement (the Shareholders Agreement) was signed on 29 December 1988 between Dato' Fawziah, Puan Maimoon and the new shareholders. Its contents *inter alia*, were the acknowledgment by the new shareholders of the hiving off, that is, the sale of the non-concession business' assets and liabilities of STKG to the respondent. Dato Fawziah was appointed as the Managing Director of STKG because of her experience in securing the First Concession Agreement which remained the only business activity of STKG.

[18] Under the Shareholders Agreement Dato' Fawziah and her mother collectively held the largest interests in STKG (20.34%). Further, Dato' Fawziah had control over the manner in which voting rights were exercised by Mitsui Construction Company Ltd, which held an 18.45% interest in STKG.

[19] Meanwhile, facilities were obtained by STKG from a consortium of bankers and a Facilities Agreement was entered into on 26 January 1989. The sum obtained was RM204,000,000.

[20] In furtherance to the First Concession Agreement, a License Agreement was entered into between DBKL and STKG on 31 January 1989 (the license agreement) in which STKG was given exclusive license to erect any advertisement or signage on licensed premises within the concession area (the advertisement rights).

[21] On or around 1 September 1990, upon completing the road works on the Cheras section of the concession area, STKG began collecting tolls at its tolling station. The rate was RM1 for light vehicles and RM2 for heavy vehicles.

[22] An unexpected event happened after STKG commenced to collect tolls. Public demonstrations took place leading the Federal Government to step in to deal with the situation. As a result thereof, DBKL by its letter dated 12 September 1990 instructed STKG to suspend the collection of tolls at the Cheras tollbooth. STKG complied with the instruction although it took the stand that it was not legally obliged to do so.

[23] Dato' Fawziah was thus asked by the Board of Directors of STKG to discuss with DBKL and the Federal Government on the various options available due to the critical financial predicament faced by STKG, namely, at risk were that the RM40 millions loan repayment yearly to its lenders would not be serviced without the toll collections and the RM65 millions investment paid in by the new shareholders of STKG. Various options, including compensation for termination, were proposed to DBKL.

[24] After the suspension of the toll collection and by 2 October 1990 it became obvious to the new shareholders of STKG that the First Concession Agreement in its original form could no longer be performed and had to be terminated. STKG authorized Dato' Fawziah being the Managing Director to negotiate for compensation in the event of termination.

[25] DBKL agreed in principle to the option that the First Concession Agreement should be terminated and that compensation would be paid. However no definite sum was mentioned.

[26] Meanwhile, Dato' Fawziah and the other shareholders received from UEM an offer to purchase all their shares in STKG.

[27] By 24 November 1990, UEM through its solicitors proceeded to make an offer to the shareholders of STKG for the acquisition of all their shares in STKG on payment of the sum of RM97,543,459.50.

[28] A draft sale and purchase agreement was thus forwarded by UEM's solicitors to the shareholders of STKG for their consideration together with a covering letter dated 11 December 1990.

[29] During the Directors' Meeting of STKG held on 13 December 1990, the directors noted that the majority of the shareholders had signed the sale and purchase agreement to sell their shares in STKG to UEM. In fact there was also a shareholders' meeting held on the same day. Common to the two meetings was a briefing note which recommended for a quick sale of the shares in STKG. The shareholders approved and accepted the recommendation.

[30] Meanwhile on 2 November 1990 Dato' Fawziah secured the execution of a Signage Sub-Licence Agreement (the Signage Sub-Licence Agreement) between STKG and the respondent which agreement contained, inter alia, the granting to the respondent by STKG an exclusive sub-licence to erect signage on the licensed premises (that is the exercise of the advertisement rights) during the concession period and in consideration thereof the respondent would pay RM1,000 per year to STKG.

[31] Dato Fawziah further managed to have the Signage Sub-Licence Amending Agreement executed on 15 December 1990 between STKG and the respondent which agreement addressed on the happenings of two events, namely:

i. for the mutual termination of the First Concession Agreement dated 20 November 1987; and

ii. the termination of the Signage Sub-Licence Agreement by STKG.

[32] On 23 January 1991 an agreement was executed on the sales of all STKG shares to Metro Juara Bhd (Metro Juara) a nominee of UEM but with Anuar Othman and Dato Halim Saad registered as the owners. Metro Juara paid a premium of approximately RM32.5 million for the shares (RM0.50 per share) bringing the total consideration to approximately RM97.5 million.

[33] On 8 February 1991 a resolution was passed by the outgoing Board of Directors of STKG wherein they resigned and new directors were appointed. They also authorized the transfer of shares to Metro Juara. In addition the outgoing Board of Directors of STKG proceeded to ratify the Signage Sub-Licence Agreement and the Signage Sub-Licence Amending Agreement. The new incoming Board of Directors was not informed of the ratification.

[34] STKG's name was then changed to Metramac Corporation Sdn Bhd (Metramac) now the appellant, subsequent to Metro Juara acquiring it. A

[35] The whole transaction was undertaken on an "as is where is" basis, with a preliminary audit undertaken by the accounting firm of Messrs Shamsir Jasani & Co. B

[36] By a letter dated 29 June 1992 through its solicitors Messrs Rashid & Lee the appellant proceeded to rescind the Signage Sub-Licence Agreement and the Signage Sub-Licence Amending Agreement on the grounds that the then Board of Directors of the appellant (then called STKG) failed to discharge their fiduciary duties to the appellant. It was alleged that those agreements were not entered in the best interest of and not beneficial to the appellant. It was also alleged that even if those agreements were ratified they would remain null and void for want of valid disclosure as to the nature, effect and basis of the Signage Sub-Licence Agreement by the then Board of Directors. C D

[37] Initially the respondent disputed and refused to accept the rescission of the two agreements by the appellant *vide* its solicitors' letter dated 6 July 1992. However, by its solicitors' letter dated 26 May 1993 the respondent considered the act of rescission by the appellant as an act of repudiation of the two agreements and accepted the same. E F

[38] Meanwhile, the First Concession Agreement was formally terminated and replaced with a new concession agreement known as the Replacement Concession Agreement dated 13 February 1992 signed between DBKL and the appellant (Replacement Concession Agreement) in which it was a term that the rights to compensation under the First Concession Agreement would cease. However DBKL subsequently paid the appellant the sum of RM405 millions. G

[39] In its suit against the appellant the respondent claimed damages and compensation from the appellant alleging breach of the terms of the Signage Sub-Licence Agreement and the Signage Sub-Licence Amending Agreement for terminating them and by giving the signage and advertising rights to third parties. H

[40] In its claim for compensation the respondent relied on the formula under cl. 8 of the Signage Sub-Licence Agreement to calculate the amount of compensation payable. In that clause it I

A was stipulated that in the event of termination of the First Concession Agreement by either the appellant or DBKL the appellant would have to pay the respondent a compensation in the sum of RM7,797,000 per annum from 1991 to 2000 less 8% discount per annum and the same would be payable from any
B compensation received from DBKL. The Signage Sub-Licence Amending Agreement which covered the Signage Sub-Licence Agreement also stipulated that the compensation sum would be payable by STKG to the respondent notwithstanding that no compensation could be recovered from DBKL.

C

[41] It was also the case of the respondent that pursuant to cl. 4.6 of the First Concession Agreement the licence for land rights granted by DBKL to STKG included the advertising rights as provided for in cl. 4.4 thereof.

D

[42] The respondent further pleaded that the sum of RM405 millions received by the appellant from DBKL was in fact compensation sum. Hence the appellant was holding it on trust and for the benefit of the respondent.

E **[43]** The appellant denied that the sum received was held under trust and countered that the said sum was a subsidy paid by the Government through DBKL for the completion of the project.

[44] Specifically the respondent sought for the following orders
F to be made against the appellant, namely:

a. Damages for the breach of the Restructure Sale Agreement in respect of Advertising Rights;

b. Further or alternatively, damages in the sum of RM65,182,920
G for breach of the Signage Sub-Licence Agreement;

c. An account with inquiries and consequential direction of all profits, monies and benefits received and to be received by the appellant under the Replacement Concession Agreement and
H the 'said contracts';

d. A declaration that the appellant holds the said profits, monies and benefits received and to be received on trust for the benefit of the respondent;

I e. A declaration that the appellant has misappropriated the sum of RM190 and an order for the restitution thereof to the respondent;

f. An order that the appellant do pay and/or transfer to the respondent all of the said profits, monies and benefits received and to be received under the Future Contracts;

g. General damages;

h. Interests; and

i. Costs.

[45] In response to the claim made the appellant denied liability and counterclaimed against the respondent contending, *inter alia*:

a. That the Signage Sub-Licence Agreement and the Signage Sub-Licence Amending Agreement were entered into between the appellant and the respondent through the previous directors, namely, Dato' Fawziah and Maimoon Bee in breach of their fiduciary duties to the appellant;

b. That Dato' Fawziah and Maimoon Bee while as directors of the appellant caused the appellant to enter into the Signage Sub-Licence Amending Agreement when they knew that no compensation would be payable by DBKL to the appellant and thus in breach of fiduciary duties as directors thereby resulting in the said Signage Sub-Licence Amending Agreement being void;

c. That Dato' Fawziah and Maimoon Bee while as directors of the appellant made secret profit arising from the execution of the Signage Sub-Licence Agreement as they were also the only directors and shareholders of the appellant at that time and they knew that in the event of the First Concession Agreement being terminated compensation would be paid by the appellant to the respondent. Further, Dato' Fawziah and Maimoon Bee took advantage of the situation by executing the Signage Sub-Licence Amending Agreement when it was already agreed by the then shareholders of the appellant to terminate the First Concession Agreement; and

d. That the Signage Sub-Licence Agreement and the Signage Sub-Licence Amending Agreement were null, void and of no effect.

A

Before The High Court

[46] The trial commenced in early March 1998 before Steve Shim J (as he then was) who heard the evidence up to the end of the first witness for the defence. Subsequently the conduct of
B the trial until delivery of judgment was taken over by Kang Kwee Gee J who:

a. held the appellant liable for breach of contract for the loss of advertising rights under the Signage Sub-License Agreement;

C b. dismissed the claim of the respondent for the sum of RM65,182,920 holding that it was subject to s. 75 of the Contracts Act 1950 and thus a penalty. Damages was therefore ordered to be assessed;

D c. dismissed the claim of the respondent for loss of profits, monies or other benefits arising from the future contracts holding that such future contracts were void for uncertainty under s. 30 of the Contracts Act 1950 The learned judge also held that there was no consideration provided by the
E respondent for such future contracts;

d. dismissed the claim by the respondent for liquidated damages; and

e. dismissed the counterclaim of the appellant.

F

[47] Dissatisfied with the decision of the High Court the respondent appealed to the Court of Appeal on several grounds. The appellant also appealed against certain orders made by the learned High Court Judge.

G

Before The Court Of Appeal

[48] There were two appeals before the Court of Appeal one by the respondent (Civil Appeal No. W-02-1009-2003) and the other by the appellant (Civil Appeal No. W-02-1013-2003).

H

[49] After hearing the two appeals the Court of Appeal made the following orders:

a. dismissed the appeal by the appellant with costs against the
I finding on liability in respect of the claim by the respondent for the loss of advertising rights;

b. dismissed the appeal by the appellant with costs on the dismissal of its counterclaim by the High Court; and

c. allowed with costs the appeal by the respondent thereby giving judgment for the respondent on the claim for the sum of RM65 million and for the loss of profits derived from future contracts to be determined by the registrar.

[50] Although the decision of the Court of Appeal was unanimous the main judgment was rendered by YA Gopal Sri Ram JCA with YA Hashim Yusof JCA concurring (the main judgment) whilst YA Zulkifli Makinuddin JCA gave a supplementary judgment (supplementary judgment). Both the judgments of the Court of Appeal for the purpose of this judgment are collectively referred to as 'the judgments'.

Before This Court

[51] The 3rd question reads:

> **Whether the Court of Appeal's adverse remarks/findings in the circumstances of this case, when viewed objectively, shows a real danger of bias on the part of the Court of Appeal in the judgment arrived at against the Appellant?**

[52] It was submitted that in both the judgments of the Court of Appeal there are remarks and findings made by the learned judges that could be construed as adverse, disparaging and unwarranted. Emphasis was made that those remarks are integral parts particularly to that of the main judgment. Hence they exhibited a real danger of bias on the part of the Court of Appeal against the appellant. The real danger of bias manifested itself from the Court of Appeal's own written judgments.

[53] Learned counsel for the appellant listed down the remarks and findings in the form of Appendix B to his written submissions. For convenience we reproduce them herein.

[54] From the main judgment the remarks and findings identified are thus:

> Paragraph 10:
>
> a. … There then took place a chain of events as evidenced by contemporaneous documents and uncontroverted facts that reveals a scandalous state of affairs.

Paragraph 11:

b. … An appeal to the then Minister of Finance, Tun Daim Zainuddin, fell on deaf ears. He simply told the Defendant's then existing shareholders that the Federal Government was not is a position to pay the defendant any compensation.

Paragraph 12:

c. The next thing that happened was this. By letters dated 12.11.1990 and 24.11.1990 a company called UEM Bhd, a public limited company made an offer to purchase all the shares in the Defendant company for a sum of RM97.5 million. Curiously enough, neither letter made any mention of the proposed termination of the concession agreement by DBKL. In reality the shares were to be purchased by a company nominated by UEM. That company was Metro Juara Sdn. Bhd. which had merely two shareholders who were also its sole directors. These gentlemen were one Anuar Othman and one Dato Halim Saad. The defendant's shareholders could not resist the sale. Their predicament is reflected in a document called the Directors Briefing Note dated 13 December 1990. And it is not difficult to appreciate their dilemma. The whole idea of obtaining the tender was Dato' Fawziah's brainchild. The other shareholders had invested large sums of money. The defendant had done all that was required of it under the first concession agreement. It had spent large sums of money to carry out its obligations. It now found itself with the ground cut from under its feet because of DBKL's termination of the first concession agreement. No compensation had been paid to the defendant as matters then stood although compensation was clearly payable. No one in his or her right mind will consider the choice of selling of their shares to Metro Juara at RM97.5 million as a choice at all. All the independent evidence on record points to this being in reality a crude case of economic duress presenting itself in a more subtle form.

Paragraph 13:

d. Now, the offer by UEM to buy out the defendant's shares for RM 97.5 million simply does not make any commercial sense. Here you have a company that has just had its loan and shareholders capital wiped out in one stroke. It had no money in its coffers. It had huge debts. It had no prospects

of receiving any compensation from DBKL. So why pay RM 97.5 million for the shares of such a company? The answer is simple enough. Anuar Othman and Dato' Halim Saad had something which the plaintiff did not. And that was the patronage of the then Minister of Finance, Tun Daim Zainuddin. …

Paragraph 14:

e. The next event that happened was the mechanics of the takeover of the defendant by Metro Juara. It was a rushed transaction. There was no examination of the defendant's books. No warranties were asked for or given. No due diligence exercise was ever carried out. An agreement called the Share Sale Agreement dated 23.01.1991 was executed. Thereafter, the defendant's name was changed to Metramac Corporation Sdn Bhd, the name by which the defendant is now cited in the instant proceedings.

Paragraph 15:

f. Not long after the take over, a strange thing happened. Where doors were once closed to the defendant before its take over, as if by the utterance of a magic spell all bureaucratic doors were opened to the defendant after its takeover by Metro Juara. And, as if by the rub of a magic lamp, the Federal Government and DBKL who hitherto claimed to be impoverished suddenly found themselves flush with funds. They were now in a financial position to compensate the defendant. The figures are staggering. In one way or another, the defendant was to receive a total sum of RM756.7 million. Let me give some details.

Paragraph 16:

g. In its letter of 30 August 1991, DBKL said that it would pay the defendant RM312 million for the costs of works done. On 13 February 1992, the Federal Government in conjunction with DBKL agreed to subsidize the defendant with a sum of RM405 million to enable the defendant to meet the cost of financing the works to be undertaken under a concession agreement that was to be entered into between DBKL and the defendant. Mark you, at this point in time, not a stick of work had been done under the new concession agreement. On that very day, that is to say, 13 February 1992, two other events occurred. First, DBKL entered into another concession agreement with the defendant. I will refer to this as the second concession agreement. Second, the Ministry for Public Works gave the defendant an undertaking

A to pay it RM32.5 million as "payment for share premium" not "previously taken into account": So far as this case is concerned, the words within quotation marks are meaningless. Because they have no nexus whatsoever to any of the agreements entered into between the several parties. You may well ask how all this could have happened without B the direct involvement of Tun Daim. It is also incomprehensible why the defendant as it was constituted immediately before the takeover by Metro Juara was not given this same financial support by the Federal Government. After all, at least two of the pre-takeover C shareholders were either Government concerns or Government assisted concerns. And in the case of Tabung Haji, the ultimate beneficiaries would have been the poorer section of our society. I think that it is a fair question to ask why taxpayers' money was channelled into the hands of two private individuals – to profit them – instead of a wider D Section of the general public. It is not at all clear why the Minister for Finance used his power to favour Anuar Othman and Dato Halim Saad.

Paragraph 17:

E h. For the sake of completeness, it must be mentioned that the RM32.5 million mentioned earlier was siphoned out of the defendant's account by Anuar Othman and Dato' Halim Saad. I asked learned counsel for the defendant during argument how this ever could have happened. His reply was F stupefying. He said that these two gentlemen had, as shareholders paid this sum into the defendant's account and were now reimbursing themselves.

Paragraph 34:

G i. The second thing that is wrong with the defendant's argument is this. Assume for a moment that the defendant's present shareholders are mounting this challenge in the name of the defendant. Assume that they are entitled to do so – which is not the law. Even so, they must come to court with clean hands. But they do not. They are the ones who H misappropriated the defendant's property – the RM32.5 million. They are the ones who, with the support of Tun Daim, oppressed the previous shareholders into parting with their shares. They are the ones who took advantage of all the ideas of Dato' Fawziah and used it for their benefit and I obtained huge payments from DBKL and the Federal Government. It is now scarcely open to them to point fingers at the plaintiff.

[55] And from the supplementary judgment the remarks and findings identified are thus: A

Paragraph 34:

a. It would appear it did not make business sense for Metro Juara to offer to pay RM97.5m for a company that had lost its only business. But it was explained by the fact that there was the commitment in principle by DBKL to compensate STKG for a sum which was estimated at RM764m. As events went an amount equivalent to this sum was indeed paid by DBKL to STKG (now called Metramac, after its takeover by the UEM-nominated Metro Juara) between August 1991 and February 1992; B C

Paragraph 35:

b. It became apparent, *albeit* later, that the Government had decided by then that UEM should take over the project by buying over STKG. The existing shareholders were all then under pressure to sell off their respective shares to UEM. The existing shareholders of STKG were also told by the then Finance Minister Tun Daim that the Government was not in the position to pay compensation to them. This is evidenced from the exchange of letters between Dato' Fawziah and Tun Daim. ...; D E

Paragraph 42:

c. In total, the payment to Metramac, by one description or the other, now totalled RM756,700,000. It is not payment under the second concession agreement. It must include the 'termination charges' of RM63m to the plaintiff put forward by Metramac itself; F

Paragraph 43: G

d. It is not mere coincidence that the sum of RM756,700,000 paid, or to be paid, to Metramac approximates the sum of RM764,000,000 claimed as compensation by STKG for termination of the first concession agreement; H

Paragraph 44:

e. It is also not mere coincidence that Metramac had to mutually agree to the termination of the first concession agreement and receive in return a payment or pledge of payment totalling RM756,000,000; I

A Paragraph 45:

f. In short, STKG which was bought by Metro Juara for a mere RM97.5m was within a year paid or pledged to be paid to Metramac a sum of RM756.7m even before undertaking the works under the second concession agreement;

B Paragraph 46:

g. In the wake of these changes, the new owners of STKG, as Metramac, have purported to rescind the signage agreement and the amendment agreement. Later they have also repudiated the restructure sale agreement of 31 March 1988.

C

[56] Briefly put it was the contention of learned counsel for the appellant that when viewed objectively, the Court of Appeal's written judgment portrayed Dato' Fawziah as the innocent victim of economic duress and the appellant's purported "present shareholders" along with Tun Daim Zainuddin as the oppressors. When viewed objectively and having regard to the circumstances of the case, the appellant and its case have been unfairly regarded with disfavour.

D

E

[57] In response to the submissions made by learned counsel for the appellant on the third question posed the submissions by learned counsel for the respondent may be summarized thus:

F a. firstly, there is a presumption of impartiality;

b. secondly, the adverse findings made against the appellant were on issues of law and supported by the evidence; and

G c. thirdly, the adverse and disparaging remarks and findings against third parties did not affect the determination of the legal issues.

The Allegation Of Bias – Any Merit?

H **[58]** We will approach this issue by considering globally the opposing contentions of the parties.

[59] Learned counsel for the respondent emphasized on the presumption of impartiality. He submitted that a litigant alleging bias against a judge has first to overcome the presumption of impartiality. The burden rests with the party making the allegation.

I

Basically learned counsel argued that bias on the part of judges should not be easily assumed since judges have been sworn to administer impartial justice. Indeed he submitted that 'the effect of the presumption boils down to this: that persuasive evidence that is cogent and convincing will be required if the presumption of impartiality of a judicial officer is to be rebutted'.

[60] To support his submission learned counsel made references to the views expressed in the Canadian Supreme Court case of *R.D.S v. The Queen* 151 DLR (4th) 193 where Cory J said (paras 113 and 117):

> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasise the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.
>
> ...
>
> Courts have rightly recognized that there is a presumption that judges will carry out their oath of office. ... This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with "cogent evidence" that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias. ... The presumption of judicial integrity can never relieve a judge from the sworn duty to be impartial.

[61] From the submission of learned counsel for the respondent it is obviously admitted that the presumption of impartiality 'does not provide blanket immunity to judges in the sense that judicial acts can never be challenged on grounds of bias.' But to rebut it requires 'cogent evidence' and to be firmly established that there is a reasonable apprehension of bias.

[62] Incidentally, it is interesting to note some of the illuminating and advisory comments made in the Canadian case. Paragraphs 118, 120 and 129 for instance state this:

> It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether the legal dispute arises between citizen

A and citizen or between the citizen and the state. *Every comment that a judge makes from the bench is weighed and evaluated by the community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct.* …

B

Regardless of their background, gender, ethnic origin or race, *all judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. It follows that judges must strive to ensure that no word or action during the course of the trial or in* C *delivering judgment might leave the reasonable, informed person with the impression that an issue was pre-determined or that a question was decided on the basis of stereotypical assumptions or generalizations.* (emphasis added).

However, it is also the individualistic nature of a determination of D credibility that requires the judge, as trier of fact, to be particularly careful to be and to appear to be neutral. This obligation requires the judge to walk a delicate line. On one hand, the judge is obviously permitted to use common sense and wisdom gained from personal experience in observing and judging the E trustworthiness of a particular witness on the basis of factors such as testimony and demeanour. On the other hand, the judge must avoid judging the credibility of the witness on the basis of generalizations or upon matters that were not in evidence.

[63] Learned counsel for the appellant submitted that 'the F branding of the appellant as the "subjective litigant" in the course of his oral submission is wholly irrelevant … it merely appears to avoid answering the issues here: are the remarks and findings not made in such an outspoken and extreme and unbalanced terms? are not the remarks and findings unnecessary and irrelevant to the G circumstances of the case? are not the remarks and findings unsupported by evidence? These questions can be answered objectively by this Honourable Court personifying the reasonable man.'

H **[64]** The respondent on the other hand further narrowed down the issue by contending that 'the adverse findings made by the concurring judges of the Court of Appeal relate to what is described as "a chain of events as evidenced by contemporaneous documents and uncontroverted facts that reveals a scandalous I state of affairs" … the adverse remarks against the third parties which are said to constitute bias on the part of the Court of

Appeal are set out as Ground 1 of the Memorandum of Appeal. It is important to note the place of these remarks in the 1st judgment (main judgment) and that these remarks were in the nature of observations of the background facts relating to the various issues arising in the appeal.'

[65] Having considered the lengthy submissions from both sides in respect of the third question posed we are of the view that the real issue is whether, premised on the remarks and findings made by the Court of Appeal in the judgments as identified by the appellant in this appeal, the element of real danger of bias has been established hence rebutting the presumption of impartiality. In other words, the test as approved by this court in cases such as *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor* [1999] 3 CLJ 65 and *Dato' Tan Heng Chew v. Tan Kim Hor* [2006] 1 CLJ 577 applies. Briefly the test involved a question to be asked, namely: 'whether, when viewed objectively, having regard to the circumstances of the case, there was a real danger of bias on the part of the relevant member of the tribunal in question, even though unintentionally, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration?'

[66] It should also be noted that the grievance of the appellant arises from the contents of the judgments of the Court of Appeal. Some of those remarks and findings are related to third parties who are not parties to the litigation between the appellant and the respondent.

[67] From the respective submissions of learned counsel for the parties it is acknowledged, *albeit* indirectly, that the approach taken by the appellant, namely, to premise the allegation of bias on the judgments of the Court of Appeal is quite unprecedented. The task is made more difficult as there appears to be hardly any judicial decision on this specific point made by our courts or by the courts in other common law jurisdictions.

[68] We also bear in mind the submission of learned counsel for the respondent that those remarks and findings complained of did not affect the correctness of the decision of the Court of Appeal.

[69] Now, in our view it does not mean that real danger of bias can never be found arising from a judgment delivered by a court of law. The Canadian case of *R.D.S v. The Queen (supra)* acknowledges that it can arise when delivering judgment. Moreover it has been said that 'in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality.' (per Lord Nolan in *Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 2) (H.L. (E.))* [2000] 1 AC 119 at p. 139).

[70] We are therefore of the opinion that the stage at which bias is said to have arisen is quite immaterial. The real danger of bias can arise at any stage in a judicial or quasi-judicial proceeding or even in administrative tribunal. The crucial point in determining the presence of bias is to objectively enquire whether the facts and circumstances asserted to be evidence of bias affirmatively answer the test for real danger of bias as formulated by this court. In other words the enquiry is to determine whether there is "a departure from the standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that having to adjudicate between two or more parties; he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute." (per Lord Thankerton in the English case of *Franklin v. Minister of Town & Country Planning* [1948] AC 87).

[71] Further, we do not think there is any good reason to limit any finding of real danger of bias in a judicial proceeding only up to the stage of pre-delivery of judgment. The element of real danger of bias can be said to have played a role in a tribunal or in any of its members at the time of coming to its decision if the judgment delivered or the contents therein render an affirmative answer after taking it through the test of bias as enunciated by this court, objectively and carefully, by the reviewing or appellate court personifying as a reasonable man or a fair-minded and informed observer. (See: *R v. Gough* [1993] AC 646).

[72] In other words the question is 'whether the allegation and the factual circumstance could have 'caused a fair-minded and informed bystander to entertain a fear of real danger of bias' (see: *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd*

& Ors [2002] 4 CLJ 268; *Locabail (UK) Ltd. v. Bayfield Properties Ltd & Anor.* [2000] 1 All ER 65). In fact in the case of *Locabail (UK) Limited v. Bayfield Properties Limited (supra)* this is what the English Court of Appeal said at pp. 77 and 78:

> ... a real danger of bias might well be thought to arise if ... in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v. Kelly* ...); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issue before him. ...

[73] But we hasten to add that any allegation of real danger of bias based on a judgment delivered should not be readily entertained by an appellate court. The reason is simple. A losing party would only be too willing to allege bias. This might be what was referred to during the submission before us as 'opening the floodgates' if the present appeal were to be entertained readily. Thus, we would therefore think that unless there exists in reality remarks and statements in the judgment delivered indicating on the face of the record a real danger of bias such allegation should be rejected summarily. In this way it will 'avoid setting aside of judgments upon quite insubstantial grounds and the flimsiest pretexts of bias'. (See: *Majlis Perbandaran Pulau Pinang v. Sykt. Berkerjasama Serbaguna Sungai Gelugor (supra)*. Indeed this is how Lord Hope of Craighead explained the rationale in *Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 2) (H.L.(E.)) (supra)* at p. 142:

> The test which must be applied by the appellate courts of criminal jurisdiction in England and Wales to cases in which it is alleged that there has been a breach of this principle by a member of an inferior tribunal is different from that which is used in Scotland. The test which was approved by your Lordships' House in *Reg. v. Gough* [1993] AC 646 is whether there was a real danger of bias on the part of the relevant member of the tribunal. I think that the explanation for this choice of language lies in the fact that it was necessary in that case to formulate a test for the guidance

A of the lower appellate courts. The aim, as Lord Woolf explained, at p. 673, was to avoid the quashing of convictions upon quite insubstantial grounds and the flimsiest pretexts of bias.

[74] Having said the foregoing we now turn to the judgments of the Court of Appeal with particular reference to the submission B that the remarks and findings complained of are evidence of apparent bias thereby rebutting the presumption of impartiality.

[75] Impartiality of course refers 'to a state of mind or attitude of the tribunal in relation to the issues and the parties in a C particular case. The word "impartial" … connotes absence of bias, actual or perceived.' (per LeDain J in *Valente v. Her Majesty the Queen* [1985] 2 SCR 673 at 685). It has also been said that 'the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and D sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.' (See: *Commentaries on Judicial Conduct* (1991) E published by the Canadian Judicial Council).

[76] But before embarking to apply the bias test on the impugned remarks and findings we think it is pertinent to first consider whether those remarks and findings were essential and F relevant in determining the matter before the Court of Appeal.

[77] We note that the claims by the respondent are for damages and compensation against the appellant for breach of contract, to wit, breach of the terms of the Signage Sub-Licence Agreement and the Signage Sub-Licence Amending Agreement for G terminating them and by giving the signage and advertising rights to third parties.

[78] Another claim is for declaration of trust in respect of the sum of an account to all monies, profits and benefits gained and H to be gained by the appellant under the Replacement Concession Agreement and future contracts.

[79] Having carefully examined the relevance and the context in which the remarks and findings were made particularly in the main I judgment of the Court of Appeal we are of the view that they

were unnecessary and irrelevant in determining the issues and claims before the court. It is indeed regrettable that those remarks made were not only unnecessary but that the language used was unwarranted to say the least. However, those remarks alone cannot *ipso facto* be the basis to set aside the decision of the Court of Appeal. (See: *State of West Bengal v. Babu Chakraborty* AIR [2004] SC 2324). More will be said on this point when determining the second matter before us.

[80] Meanwhile, judges, magistrates and those entrusted to perform judicial or quasi-judicial functions are well advised to bear in mind at all times what was said by this Court in *Insas Bhd v. Ayer Molek Rubber Co Bhd* [1995] 3 CLJ 328 at p. 340:

> The objectionable and wholly offensive remarks made against a court of law, the plaintiffs and their solicitors, and the learned High Court judge, all of whom had had no opportunity to defend themselves in the face of such unwarranted and unjustified criticisms, ought to be expunged from the judgment of the Court of Appeal, as it has a tendency to bring the whole administration of law and order in the courts into disrepute. It is judicially recognized that judicial pronouncements should be judicial in nature and not depart from sobriety, moderation, and reserve. It has been said elsewhere that the pen of a judge should be like the knife of a surgeon which probes into the flesh only as much as is absolutely necessary for the purpose of the case before it. A judge should neither reward virtue nor chastise vice, and his judgment should not display emotion and intemperance as displayed in the judgment of the Court of Appeal here.

[81] We are aware that judges are entitled to express their opinion and observations including criticism in a given case. (See: *K: a Judicial Officer* AIR [2001] SC 972). There are a host of cases on the point. In *Bahai v. Rashidian & Anor* [1985] 3 All ER 385 the English Court of Appeal observed thus:

> The fact that a judge has determined the issues in the action and in so doing has expressed views on the conduct of the parties and of the witnesses, neither constitutes bias nor the appearance of bias in relation to subsequent applications in the action. (per Sir John Donaldson MR at page 388).

In the same case Balcombe LJ at p. 391 said:

A judge properly exercising his judicial function, eg by criticising the conduct of a party's solicitor in the course of his judgment on a matter which he considers relevant to his decision, cannot by that process be said to be biased. Bias is the antithesis of the proper exercise of a judicial function.

Similar opinion was expressed by Bingham MR in *Inner West London Coroner, ex parte Dallaglio* [1994] 4 All ER 139 when he said this:

... it not infrequently happens that judges find themselves called upon to criticise, sometimes in strong terms, parties or witnesses appearing before them. The subjects of such criticisms are apt to complain that the judge was prejudiced or biased against them. But such complaints will carry no weight with an appellate court provided the criticisms were based on material properly before the judge in that case and were not, in the light of that material, inappropriate. In such a case there is no element of extraneous prejudice or predilection and hence, in the eyes of the law, no question of bias.

[82] But as those cases show such criticisms or remarks are not without limit. They 'will carry no weight for the appellate court provided the criticisms were based on material properly before the judge in that case and were not, in the light of that material, inappropriate.' Hence, in our view what is expected from an adjudicating tribunal is to consider only the evidence adduced to determine if the claims have any merits. In the present appeal the claims are not in the nature of public interest litigation or having an element of public law so as to warrant remarks and findings as found in main judgment of the Court of Appeal. We do not think the Court of Appeal was called upon to adjudicate a dispute which required it to champion the cause of taxpayers or to deride the reputations or even to rebuke those not parties to the action for their alleged abuse of powers.

[83] There is of course the issue of judicial independence. However, a judge must accept that the freedom attached to his adjudicative independence imposes concurrent responsibility to address only those issues properly before him, along with a duty to make every effort to maintain impartiality and objectivity in dealing with the issues and parties before him. Independence means that in the discharge of his function a judge is subject to nothing but the law and the command of his conscience. This aspect of the concept of judicial independence refers to the neutrality of mind of the judge, to his impartiality and his total

freedom from irrelevant pressures. The goal of judicial independence is to ensure justice is done in individual cases and to ensure public confidence in the justice system. Le Dain J in *R v. Valente* [1985] 19 CRR 354 at p 364 said:

> Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is therefore important that a tribunal should be perceived as independent as well as impartial, and that the test of independence should include that perception.

[84] We now turn to the allegation and assertion of real danger of bias arising from those impugned remarks and findings. It is trite law that any decision tainted with real danger of bias as found would invariably be set aside. (See: *R.D.S v. The Queen (supra); Reg. v. Bow Street Magistrate, Ex p. Pinochet (No. 2) (H.L.(E.)) (supra))*.

[85] The main judgment declares that 'a chain of events as evidenced by contemporaneous documents and uncontroverted facts that reveals a scandalous state of affairs.' There are also the concluding statements made in the main judgment noting that greater care was taken in examining the findings of the lower court and 'have very carefully scrutinised the disclosure documents. I have read them again and again'. In our view these declarations are not magical mantras that would preclude further scrutiny. Thus, it falls upon us to determine if there is such evidence which justifies those remarks and findings.

[86] It is not in dispute that those remarks and findings were directed not only against the appellant but also against certain personalities who were not parties to the suit. In short the nett effect of the remarks and findings by the Court of Appeal is that the actions or behaviour of those persons mentioned amounted to economic duress against the former shareholders of the appellant, patronage and abuse of governmental powers and positions for personal gains of some persons in complete disregard to taxpayers' money, misappropriation of funds bordering on criminal breach of trust and the making of wild allegations against the respondent.

[87] In the main judgment the learned judges painted this scenario. That Dato' Fawziah and her mother had an excellent idea which was then translated into the core business of the appellant. After substantial investment obtained from the other

previous shareholders success of the business was in sight when suddenly the suspension of the toll collection came about which spelled economic disaster to those previous shareholders. No one came to assist, not even the Federal Government or DBKL, despite requests for assistance. It was when the previous shareholders were in dire strait that the present shareholders appeared offering them a sum of money that they had no choice but to accept in order to avoid total financial disaster. That the present shareholders could make such move due to what they could subsequently manage to obtain not only from the Government but also from DBKL. The reason they could do it was because they had the patronage of the then Minister of Finance Tun Daim Zainnuddin who earlier on did not assist the previous shareholders but instead told them bluntly that the Federal Government could not pay when asked to do so. The present shareholders with the assistance of the then Minister therefore earned huge gains out of the idea of Dato' Fawziah. Such gains came about as a consequence of abuse of powers by the then Minister in preferring to help the present shareholders when earlier on the previous shareholders were not helped despite requests.

[88] We have perused the evidence adduced. No one made any allegation that he or she was compelled by the situation to sell his or her shares in STKG, the then name of the appellant, to the present shareholders. In fact Dato' Fawziah's own words in her letter of 7 February 1995 to the then Minister of Finance wrote that as a businesswoman 'I regarded the take-over purely as a business proposition between the parties concerned'. No witness came to testify that the suspension of the toll collections was engineered by the present shareholders of the appellant or by the then Minister in order to take over the business of the appellant. The relevant persons including the then Finance Minister were never called to testify. They were not given any opportunity to state their versions of the event. No doubt a 'denial of the opportunity of being heard is a wrong which is personal to the party aggrieved. If therefore such a party does not complain, it is not the affairs of others to complain.' (See: *Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72). But in this case those persons referred to in the remarks by the Court of Appeal are strenuously complaining as indicated by their applications to intervene. In any

event it was not necessary at the trial stage since the case of the respondent was premised on an entirely different footing. It was only at the appeal stage and particularly due to the main judgment of the Court of Appeal that the need for them to state their versions became quite apparent. But the Court of Appeal did not seem to have realized that need oblivious of what was said by the Supreme Court in *Sundram v. Arujunan & Anor* [1994] 4 CLJ 300 at p. 309:

> The third point we should like to consider, may be conveniently described as the natural justice point. In our view, it was neither right nor fair to find that the plaintiff's head injury had been caused as a result of the prior collision involving the plaintiff's motor cycle and the other motor cycle, without hearing the rider of the other motor cycle. Indeed, as we have mentioned, at the outset, he was never cited as a party in the suit or even called as a witness, and no explanation had been vouchsafed to the trial court for this glaring omission. There was, therefore, a clear breach of the rule of natural justice embodied in the maxim *'audi alteram partem'* ...

[89] Correspondences exchanged do not also portray an abuser-victim situation. The other previous shareholders of the Appellant were not mere country yokels. They were experienced corporate personalities and established statutory bodies such as Tabung Haji. In fact the other previous shareholders of the appellant were not even parties to the suit. Surely there would have been avalanche of protests written if they had been oppressed. Subsequent payments made by the Federal Government and DBKL were given with explanations. But the way the Court of Appeal in the main judgment put it was as though those payments were dished out without any sense of accountability and according to the whims and fancies of the then Minister of Finance. These remarks reflected such a mood:

> It is also incomprehensible why the defendant as it was constituted immediately before the takeover by Metro Juara was not given this same financial support by the Federal Government. After all, at least two of the pre-takeover shareholders were either Government concerns or Government assisted concerns. And in the case of Tabung Haji, the ultimate beneficiaries would have been the poorer section of our society. I think that it is a fair question to ask why taxpayers' money was channelled into the hands of two private individuals – to profit them – instead of a

A wider section of the general public. It is not at all clear why the Minister for Finance used his power to favour Anuar Othman and Dato Halim Saad.

...

B In short, STKG which was bought by Metro Juara for a mere RM97.5m was within a year paid or pledged to be paid to Metramac a sum of RM756.7m even before undertaking the works under the second concession agreement.

C **[90]** The total sum RM97.5 millions paid to the previous shareholders far exceeded the initial sum of RM65 millions invested. In other words they recovered the sums invested plus some profit which might not have been realized due to the suspension of the toll collection arising from the public demonstration against it. In any event at that point in time Dato' D Fawziah, her mother and the previous shareholders had an alternative cause of action open to them to seek legal remedy and was not obliged to accept the offer by the present shareholders of the appellant. They also had the benefit of having the services of legal advisors. Yet finally the offer by the present shareholders E of the appellant was accepted. It could not therefore be said that they were under economic duress at the time of sale as erroneously found by the Court of Appeal.

[91] Thus the scenario painted by the learned judges in the F main judgment came about from their own inferences and imagination. Sadly, reading objectively the main and the supplementary judgments one cannot avoid the sense that at the outset the learned judges had the preconceived minds that the primary issue was about the powerful (Goliath) taking advantage G of the weak (David). They seemed to believe without due regard to the evidence adduced that there was an arrangement concluded between the present shareholders of the appellant, the then Minister of Finance on behalf of the Federal Government and DBKL to ensure that the appellant would profit from the H acquisition of the shares from the previous shareholders of the appellant. Hence, the Court of Appeal was all set to uncover a perceived 'scandalous state of affairs'. In our view it was their inferences and imagination that took the centre stage leaving the evidence adduced on the back seat. With respect we find that the I Court of Appeal went on a frolic of its own.

[92] Obviously it was a case of striking at those persons who had no opportunity to defend themselves under a cover of judicial performance. A reminder is thus apposite that it *'can cause great unfairness to third parties if judges make findings of fact or comments which pay no regard to this matter. As a general rule, it is inappropriate, and often unfair, for a judge, in reasons for judgment, to make an unqualified adverse finding concerning someone who is not a party to litigation and who has had no opportunity to answer the allegation in question … Non-parties can often be seriously damaged by a judge's manner of expressing reasons for judgment. Sometimes this may be the result of mere thoughtlessness. A judge should never cause unnecessary hurt.'* (See: *Aspects of Judicial Performance* by Murray Gleeson AC, Chief Justice of Australia).

[93] A plain private claim for breaches of contract and express trust was turned into a kind of public interest litigation by the learned judges of the Court of Appeal without much push from the respondent. Indeed the allegations in the main judgment of patronage, abuse of power and economic duress could only have come in our view from the allegations *inter alia* of "pressure to sell" the shares, receipt of "instruction" from Tun Daim and Metro Juara 'not foolish in offering" made in the submissions of counsel for the respondent in the Court of Appeal and not as pleaded by the respondent. Unfortunately the Court of Appeal in its main judgment seems to have swallowed those allegations of counsel hook, line and sinker. The basic principle of law that a party is bound by its pleadings was ignored. The proper approach should have been to 'scrutinize the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regard to the issues'. (See: *R Rama Chandran v. The Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147). It is also useful to remind judges and judicial arbiters that judgment should be '"pronounced upon the law and the facts of the case, and in discharging this very responsible duty, the judge publicly, in open court, assigns the reasons for his decisions, stating the principles and authorities on which he decides the matters of law, and reciting or advertising to the various parts of the evidence from which he deduces his conclusions of fact; and thus the matter in controversy between the parties becomes adjudged" per Lord Shaw in *Scott v. Scott* [1913] AC 417 at pp. 472.

[94] Hence, considered objectively, we find that there was no basis for the Court of Appeal to make the remarks and findings that there were economic duress, patronage, abuse of governmental positions and powers in complete disregard to taxpayers' money and misappropriation of funds. It is unfortunate that the Court of Appeal made the remarks and findings purportedly based on 'contemporaneous documents and from the circumstances, oral and documentary evidence, all the independent evidence on record and record of appeal' without properly adverting to any of them. Further, gleaned from the exceptional strong and emotive language used particularly in the main judgment it is our view that a reasonable person would be persuaded to conclude that 'there was a real danger of bias on the part of the relevant members' of the Court of Appeal 'even though unintentionally, in the sense that they might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of' appellant.

[95] The remarks and findings were primarily directed against third parties who were not parties to the suit. Learned counsel for the respondent contended that such remarks and findings did not affect the fairness of the proceeding and its result. For the appellant it was argued that the appellant was found 'guilty by association' with the third parties.

[96] With respect we are inclined to agree with the learned counsel for the appellant. The remarks and findings may appear to have been directed to third parties. But the consequence of those remarks and findings fell upon the appellant. The reason is that the Court of Appeal rolled up the third parties with the appellant and that the appellant was assumed as the ultimate beneficiary of the actions and conduct by the third parties. In fact upon reading those remarks and findings one would be inclined to come to a conclusion that the appellant was 'punished' for the purported misdeeds by the third parties. This summation is borne out of the remark in the main judgment which reads:

> Assume for a moment that the defendant's present shareholders are mounting this challenge in the name of the defendant. Assume that they are entitled to do so – which is not the law. Even so, they must come to court with clean hands. But they do not. They are the ones who misappropriated the defendant's property – the RM32.5 million. They are the ones who, with the support of Tun

> Daim, oppressed the previous shareholders into parting with their shares. They are the ones who took advantage of all the ideas of Dato' Fawziah and used it for their benefit and obtained huge payments from DBKL and the Federal Government. It is now scarcely open to them to point fingers at the plaintiff.

[97] The nexus of the remarks and findings to the outcome of the appeal before the Court of Appeal is therefore quite glaring.

[98] We are therefore inclined to agree with the submission of learned counsel for the appellant that the remarks and findings found particularly in the main judgment of the Court of Appeal are not supported by evidence 'yet they "make use of injudicious, unfair and extravagant language" in such extreme, outspoken and unbalance terms in that they were "out of all proportion to or not commensurate with the circumstances before the court" and they excite an apprehension that the Court of Appeal might not bring an unprejudiced mind to the resolution of the matter before it. There is indeed a real danger that the appellant's case had been unfairly regarded with disfavour, and its arguments were not addressed by the Court of Appeal although they were either submitted or apparent from the record of appeal.' In short the element of real danger of bias is present especially in the main judgment of the Court of Appeal.

[99] Having said the foregoing there is still the contention that despite the remarks and findings in the main judgment, the decision of the Court of Appeal should be maintained since there is the supplementary judgment to support it.

[100] With respect we find that all the learned judges of the Court of Appeal spoke with one mind. The issue of severing the impugned remarks and findings in the main judgment does not arise. Their own statements on record indicate that position. In particular his Lordship Zulkefli Makinudin JCA said that he "had read the judgment in draft of my learned brother Gopal Sri Ram JCA and fully agree with the views expressed and all the orders made by his lordship on the said two appeals before us" and that "the legal issues arising from the above mentioned factual circumstances have been comprehensively dealt with by my learned brother Gopal Sri Ram JCA in his judgment." His Lordship Hashim Yussof JCA expressed his agreement on what were said in the main judgment. In any event we find that even the remarks as identified in the supplementary judgment are equally

unnecessary and unsupported by the evidence adduced. For instance, the finding in the supplementary judgment that it was due to the commitment by DBKL to compensate 'STKG in principle, estimated at RM764m, explains why UEM/Metro Juara bought over STKG on short notice and without due diligence' implies that there was an unhealthy and hidden arrangement between the present shareholders of the appellant and DBKL to the prejudice of the respondent. However, the evidence adduced could not be said to irresistibly support such a conclusion.

[101] Hence for the reasons we have stated we are of the view that the decision and judgments of the Court of Appeal cannot stand the test of real danger of bias. We would therefore answer Question 3 as posed in the affirmative. The consequence is that the decision and judgments of the Court of Appeal are therefore set aside.

[102] Having come to the foregoing conclusion we need to address whether to remit the matter back to the Court of Appeal or we should consider and review the findings of the learned High Court judge bearing in mind the materials before us.

[103] After considering the arguments advanced before us we are of the view that remitting this matter to the Court of Appeal will be unnecessary and inappropriate in the circumstances. The High Court had made findings of fact which this Court would thus be as able as the Court of Appeal to decide on the issues of law involved. (See: *T v. Secretary of State for the Home Department* [1995] 1 WLR 545; *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [2000] 2 CLJ 833.) Further, remittal means additional costs and delay involved to the prejudice of both parties. Meanwhile, it is not unheard of for this court, after having ruled that the decision of the lower court was a nullity, to proceed to make the necessary orders as to prevent injustice without having to remit a matter to the lower court. (See: *R Rama Chandran v. The Industrial Court Of Malaysia & Anor (supra)*). We would therefore proceed to evaluate the materials before us to determine whether the decision of the High Court judge could be sustained. In other words, this court has to consider whether the High Court was correct in finding:

a. that the appellant is liable for breach of contract which would include the question on the enforceability of the various agreements relevant to the parties and dealt with by the Court of Appeal;

b. that cl. 8 of the Signage Sub-Licence Agreement is a penalty and thus the appellant is not liable to pay the sum of RM65,182,920 but only for damages to be assessed;

c. that the agreement in respect of future contracts is void and thus the question of trust account as contained in cl. 10 of the Restructure Sale Agreement does not arise; and

d. that the counterclaim of the appellant should be dismissed.

[104] No doubt the issue of liability under the agreements was not posed before us. But since we have set aside the decision of the Court of Appeal and that we are proceeding to review the matter afresh it is only appropriate that we should consider *albeit* briefly the issue which in fact was also submitted to us. We make it clear that we are not adding any issue or question posed before us. We take this approach in view of the decision we have made on the status of the decision of the Court of Appeal.

[105] Further, in carrying out the foregoing exercise we would *ipso facto* be dealing with questions 2 and 3 as posed before us. We also bear in mind the contention of learned counsel for the respondent that notwithstanding our decision on Question 3 the remaining Questions 1 and 2 should be considered on their own since they involved issues of law premised only on limited relevant facts.

Enforceability And Liability Under The Various Agreements

[106] We have carefully scrutinized the reasons given by the learned High Court Judge in finding liability for breach of contract against the appellant. We have also taken time to deliberate on the contentions advanced before us by learned counsel for the appellant on this point. With respect we have not been persuaded.

[107] We are entirely in agreement with the summation by the learned High Court Judge when he said this:

> A contract is essentially a bargain and in the absence of any vitiating elements such as misrepresentation or fraud, the court will enforce it. The defendant (the Appellant before us) cannot now claim that the directors of the plaintiff (the Respondent before us) had acted in bad faith in not declaring their interest in the

A plaintiff's company or the existence of the agreements before Metro Juara signed the Share Sales Agreement with the shareholders (including the directors of the plaintiff) of the defendant (then known as Syarikat Teratai on 23/1/1991. In proceeding to enter into the Signage Agreement with the defendant in 1990, the plaintiff was in fact exercising its right to the advertising right under Clause 2.2 of the Sale Agreement it had entered into earlier in March 1988 which it had every right to do so.

In failing to honour its obligation under the Signage Sub-Licence Agreement, the defendant had committed a breach to which the plaintiff would have a right to claim damages.

[108] Hence, we affirm the finding of liability of the appellant as found by the learned High Court Judge.

Question 2:

Whether the test adopted by the Court of Appeal, in determining whether Clause 8 of the Signage Agreement is a stipulation by way of a penalty and/or a sum named in the contract for purposes of Section 75 of the Contracts Act 1950, is the correct test and/or is exhaustive?

[109] This question arises in relation to cl. 8 of the Signage Sub-Licence Agreement as amended by the Signage Sub-Licence Amendment Agreement *vis-à-vis* s. 75 of the Contracts Act 1950. To put it in term of a given sum it is whether s. 75 applies to the sum of RM65,182,920 as claimed by the respondent calculated pursuant to cl. 8 thereof.

[110] The learned High Court Judge held that in failing to honour its obligation under the Signage Sub-Licence Agreement the appellant had committed a breach to which the respondent would have a right to claim damages. He then proceeded to consider whether the respondent was entitled to the compensation under cl. 8 of the agreement. He also found that it was common ground that DBKL had committed a breach of the First Concession Agreement by suspending the right of the appellant to collect toll on 12 September 1990.

[111] Clause 8 of the Signage Sub-Licence Agreement in its unamended form reads:

8 Charges Payable On Cancellation Of Contract

8.1 If the Concession agreement is terminated in any of the following circumstances:

(a) by the company pursuant to Clause 15.3 of the Concession agreement; or

(b) by the Datuk Bandar pursuant to Clause 15.4 of the Concession agreement,

then notwithstanding anything in Clause 1.4, this Agreement shall be cancelled automatically upon such termination becoming effective.

8.2 STKG acknowledges that the Licensee expects to receive revenue during each of the years commencing in 1 January, 1991 and ending on December, 2000 of RM7,797,000. It is agreed that upon cancellation under Clause 8.1 the Licensee shall be entitled to receive following:

(a) If cancellation occurs prior to 1 January, 1991, the following sums:

(i) RM7,797,000 in respect of 1991, and

(ii) The discounted value of RM7,797,000 in respect of each the years 1992 to 2000 applying discount rate of 8% annum

(b) If cancellation occurs on or after 1 January 1991, the following sums:

(i) RM7,797,000 in respect the year in which cancellation occurs (the 'Relevant Year') less any amounts already received by the Licensee and payable to it in respect of that year; and

(ii) the discounted value of RM7,797,000 in respect of each of the years from the Relevant Year to 2000 applying a discount rate of 8% per annum; and

(c) if cancellation occurs in 2000 RM7,797,000 less any amounts already received by the Licensee or due to the Licensee and payable to it in respect of that year, together, in each case with interest at the rate of 9% per annum on the sum payable calculated from the date of cancellation to the date of payment by Datuk Bandar under the Concession agreement.

A

8.3 (a) It is agreed that upon cancellation of this Agreement, a debt shall arise as calculated in accordance with Clause 8.2 and the debt shall be payable by STKG as a result of the cancellation of this Agreement PROVIDED THAT STKG shall only be obliged to make payment of the said debt due to out of moneys recovered from Datuk Bandar pursuant to the Concession agreement and the Licensee shall not take action to recover such debt from STKG except if and to the extent that such moneys have been so recovered by STKG.

B

(b) To the extent that money recovered from Datuk Bandar pursuant to the Concession agreement or the Licence Agreement are clearly identifiable as payments in respect of cancellation of this Agreement STKG shall pay those sums to Licensee forthwith upon receipt.

C

(c) To the extent that moneys recovered from Datuk Bandar pursuant to the Concession agreement are clearly identifiable as payments in respect of cancellation of this Agreement then STKG shall pay to the Licensee a sum calculated in accordance with the following formula:

D

Payment:

E

$$R + C - (L + CI + T) \times CC\ TC$$

where

R means the total compensation claim received from the Government;

F

C means the amounts of cash held by STKG (plus deposits);

L means the sum of all financial indebtedness to financial institutions;

G

CI means the sum of all current indebtedness of STKG, being moneys paid on a monthly or immediate basis, but not including claims for cancellation of contracts;

H

T means all tax payments, due or to become due;

TC means the value if all claims lodged by STKG against Datuk Bandar; and

I

CC means the value of claims under this Agreement.

[112] Clause 8 was slightly amended with the execution of the Signage Sub-Licence Amendment Agreement on 15 December 1990. The relevant portion of cl. 8.1 as amended reads:

> 8.1 If:
>
> a. the Concession Agreement or the Licence Agreement or STKG's rights under either of them are, with the consent of STKG, terminated, …; or
>
> b. STKG terminated this Agreement …:'

[113] Indeed the learned High Court Judge had failed to appreciate that the relevant clause to consider should be the amended version. The effect of the amendment was basically to amend the triggering point for a claim to arise under cl. 8, to include the mutual termination of the First Concession Agreement or upon the termination of the Signage Sub-Licence Agreement by STKG.

[114] The learned High Court Judge held that the compensation provision under cls. 8.2 and 8.3 was unenforceable for it contravened s. 75 illustrations (d), (e),(f) and (g) of the Contracts Act 1950. Consequently he ruled that the respondent was not entitled to be compensated in accordance with those clauses.

[115] Unfortunately the learned High Court Judge did not elaborate his reason other than quoting the illustrations as given in the statutory provision.

[116] In the impugned main judgment of the Court of Appeal it was held *inter alia* that there was a breach of contract in that the Signage Sub-Licence Agreement as amended was breached hence *prima facie* s. 75 would be applicable. However, the "formula set out in the amended cl. 8 is not 'a sum named in the contract'. It follows that s. 75 does not bite on that count". His Lordship Gopal Sri Ram JCA did 'not think that the cl. 8 formula is a penalty'. He went on to say this:

> To be a penalty it must hold the other contracting party in terrorem. In other words it must be extortionate. So, a clause in a contract for the sale and purchase of property that enables the vendor to forfeit a non-extortionate deposit is not a penalty and does not come within s. 75.' … In my judgment, there is nothing extortionate about the cl. 8 formula. It is not, objectively speaking, directed at ensuring that the defendant performs its

> obligation under any contract it had with DBKL. It merely comes into operation upon the happening of a contingency, namely, the mutual termination of the first concession agreement. That event did happen and as a result the formula has to be used to calculate the losses suffered by the plaintiff. There is another reason why s. 75 does not apply to the facts of this case. Section 75 is concerned with the question whether a sum named in a contract or a stipulation in a contract is a genuine pre-estimate of the damages that the innocent party may suffer in the event of a breach. It has no application to an action for a simple debt, although it does apply to extortionate claims of interest on a debt. In my judgment, cl. 8 creates a debt in the plaintiff's favour.... We have before us a commercial contract. And, as I have already said, the defendant's liability to the plaintiff was contingent upon the first concession agreement being mutually terminated. That event having happened, what the plaintiff was entitled to recover from the defendant were not damages but was a debt. ... As I have already said, the cl 8 claim is in truth an action to recover a debt owed by the defendant to the plaintiff. That debt is the sum of RM65,182,920 arrived at in accordance with the cl 8 formula.

[117] Learned counsel for the respondent before us submitted a similar argument that there was a mutual termination of the First Concession Agreement hence there was no application of s. 75 which only addresses when there is a unilateral breach of contract.

[118] With respect we are inclined to agree with the approach adopted by the learned judge in the impugned main judgment of the Court of Appeal in that the contract in issue should be the Signage Sub-Licence Agreement as amended. Indeed there was a breach of that contract by the appellant. We note that the High Court Judge premised his finding of liability against the appellant on the unamended Signage Sub-Licence Agreement. However, since the effect of the amendment was only related to the triggering point his finding on liability should not be affected. The remaining issue therefore is whether the damages computed in accordance with the formula in cl. 8 is caught by s. 75 of the Contracts Act 1950.

[119] Section 75 reads:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual

damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Illustrations - (d), (e) (f) and (g):

(d) A gives B a bond for the repayment of $1,000 with interest at 12 per cent at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the court considers reasonable.

(e) A who owes money to B, a moneylender, undertakes to repay him by delivering to him 10 gantangs of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 gantangs. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

(f) A undertakes to repay B a loan of $1,000 by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows $100 from B and gives him a bond for $200 payable by five yearly instalments of $40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.

[120] In this country the distinction between liquidated damages and penalties is no longer significant in view of s. 75 of the Contracts Act 1950. (See: *SS Maniam v. The State Of Perak* [1957] MLJ 75; *Linggi Plantations Ltd v. Jagatheesan* [1972] 1 MLJ 89). But we had allowed Question 2 to be posed at the leave application stage since we were then considering the point in relation to the impugned judgments of the Court of Appeal in this matter. Since they have been set aside the complaint by the appellant that the Court of Appeal applied the wrong test for s. 75 is no longer relevant. We are now left with the task of reviewing whether the learned High Court Judge was correct in his conclusion on cl. 8 of the Signage Sub-Licence Agreement as amended by the Signage Sub-Licence Amending Agreement.

[121] Whether a provision in an agreement comes within the ambit of s. 75 is one of construction. And although s. 75 has done away with the significant distinction between penalty and liquidated damages under common law some of the pronouncements of the principles in *Dunlop Pneumatic Tyre Co, Ltd v. New Garage and Motor Co Ltd* [1914-15] All ER Rep 739 are still relevant in considering whether a provision comes within the ambit of s. 75. The House of Lords in that case speaking through Lord Dunedin at pp. 741-742 said this:

> In both of these cases many of the previous authorities were considered. In view of that fact, and of the number of the authorities available, I do not think it advisable to attempt any detailed review of the various cases, but I shall content myself with stating succinctly the various propositions which I think are deducible from the decisions which rank as authoritative:
>
> (i) Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.
>
> (ii) The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage: *Clydebank Engineering Company v. Yzquierdo y Castaneda (Don Jose Ramos)* [1905] AC 6; 74 LJPC 1; 91 LT 666; 21 TLR 58 (HL); 17 Digest (Repl) 149, 489.
>
> (iii) The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach: *Public Works Comr v. Hills* [1906] AC 368; 75 LJPC 69; 94 LT 833 (PC); 17 Digest (Repl) 149, 490 and *Webster v. Bosanquet* [1912] AC 394; 81 LJPC 205; 106 LT 357; 28 TLR 271 (PC); 17 Digest (Repl) 156, 532.
>
> (iv) To assist this task of construction various tests have been suggested, which, if applicable to the case under consideration, may prove helpful or even conclusive. Such are:
>
> (a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to

have followed from the breach – illustration given by Lord Halsbury, LC, in the *Clydebank Engineering Company v. Yzquierdo y Castaneda (Don Jose Ramos)* [1905] AC 6; 74 LJPC 1; 91 LT 666; 21 TLR 58 (H)L; 17 Digest (Repl) 149, 489.

(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid: *Kemble v. Farren* [1829] 6 Bing 141; 3 Moo & P 425; 7 LJO SCP 258; 130 ER 1234; 17 Digest (Repl) 157, 546. This, though one of the most ancient instances, is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that, when A promised to pay B a sum of money on a certain day and did not do so, B could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable – a subject which much exercised Jessel, MR, in *Wallis v. Smith* [1882], 21 Ch D 243; 52 LJ Ch 145; 47 LT 389; 31 WR 214 (CA); 17 Digest (Repl) 77, 14 – is probably more interesting than material.

(c) There is a presumption (but no more) that it is a penalty when:

> a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damages': per Lord Watson in *Lord Elphinstone v. Monkland Iron and Coal Co* [1886] 11 App Cas 332; 35 WR 17 (HL); 17 Digest (Repl) 158, 555 (11 App Cas at p 342).

On the other hand:

(d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties: *Clydebank Engineering Company v. Yzquierdo y Castaneda (Don Jose Ramos)* [1905] AC 6; 74 LJPC 1; 91 LT 666; 21 TLR 58 (HL); 17 Digest (Repl) 149, 489 per Lord Halsbury; *Webster v. Bosanquet* [1912] AC 394.

[122] Further, it is trite law that the burden to prove that a specified sum or stipulation is a penalty is upon the party sued for its recovery. (See: *Robophone Facilities Ltd v. Blank* [1966] 1 WLR 1428). And in our view the mere use of formula in calculating the sum payable does not necessarily mean that it can never be a 'sum named in a contract' for the purposes of s. 75. It is a matter of construction premised in its 'terms and inherent circumstances, judged of as at the time of the making' of the agreement, not as at the time of the breach. In other words it 'depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages.' (See: *Law v. Redditch Local Board* [1982] 1 QB 127).

[123] The Indian cases took a similar approach. In the case of *PK Achuthan v. State Bank of Travancore, Calicut* AIR [1975] Ker 47, a case cited in the main judgment of the Court of Appeal, it was said thus:

> The question whether a particular stipulation in a contractual agreement is in the nature of a penalty has to be determined by the court against the background of various relevant factors, such as the character of the transaction and its special nature, if any, the relative situation of the parties, the rights and obligations accruing from such a transaction under the general law and the intention of the parties in incorporating in the contract the particular stipulation which is contended to be penal in nature. If on such a comprehensive consideration, the court finds that the real purpose for which the stipulation was incorporated in the contract was that by reason of its burdensome or oppressive character it may operate in terrorem over the promisor so as to drive him to fulfil the contract, then the provision will be held to be one by way of penalty.

[124] Having therefore considered objectively cl. 8 as a whole bearing in mind, *inter alia*, its 'terms and inherent circumstances, judged of as at the time of the making' of the agreement, not as at the time of the breach, we are in agreement with the learned High Court Judge that applying s. 75 it is a penalty in nature in that the said clause constitutes a threat held against the appellant 'in terrorem' more in the nature of a security extended to the promisee to the effect that the agreement would be performed and not a genuine pre-estimate of the damage which is likely to be suffered by the respondent in the event of such breach.

[125] We are also inclined to agree with the learned counsel for the appellant that the formula, based on the respondent's annual expected revenue of RM7,797,000 in order to come up with the total claim of RM65,182,920, is not a genuine pre-estimate damages that would be suffered by the respondent in the event of a breach of its contractual obligations by the appellant. Computing the annual expected revenue itself involves many variables and other factors, including the method, necessary to be taken into account. In other words the sum payable is extortionate in that it is unreasonably high thus requiring the court to intervene by way of assessment to come to a reasonable compensation payable. Indeed the fact that there is only the payment of an annual licence of RM1,000 by the respondent in return for an annual estimate revenue of RM7,797,000 does make the argument attractive in that the sum claimed is unreasonably disproportionate to the nature or extent of the injury. However, we are also mindful to uphold the principle of sanctity of contract and the absence of any evidence indicating that at the time of entering into the contract the parties were not on equal footing. Hence, we do not propose to give any weight to the foregoing argument.

[126] The usage of the phrase 'a debt shall arise as calculated in accordance with cl. 8.2 and the debt shall be payable by STKG as a result of the cancellation of this agreement' does not *ipso facto* rule out the probability that the sum payable can be a 'sum named in a contract' for the purposes of s. 75. It is a matter of construction of the relevant terms with due regard to the inherent circumstances at the making of the agreement.

[127] Accordingly, for the above reasons we are in agreement with the conclusion by the learned High Court Judge that 'there shall be an order that damages be assessed in respect of the loss suffered' by the respondent 'to take account of and for the duration of the Replacement Agreement any advertising rights that may have been granted under the Replacement Concession Agreement' which the appellant 'signed within the ambit of cl. 1.4 of the Signage Sub-Licence Agreement'.

[128] As alluded to earlier in view of our answer to Question 3 we do not have to answer Question 2 in its original context. But even if we have to it is obvious from our above reasons that the answer would have to be in the negative.

Question 1:

Whether the creation of a trust by a company amounts to an illegal reduction of its capital?

[129] Before the High Court the issue was on the claim for account and payment of income earned on 'future contracts'. It was premised on cls. 9 and 10 of the Restructure Sale Agreement.

[130] The learned High Court Judge held that the agreement "with respect to the 'sale' of 'future contracts' to the respondent "was void for uncertainty." He gave his reasons, *inter alia*:

i. that it was incapable of being identified what constituted 'such projects or works other than such projects relating to the Concession Agreement' that would oblige the appellant to sub-contract to the respondent;

ii. that there was no mechanism provided for in the Restructure Sale Agreement for making such determination;

iii. that there was no indication of how long the obligation would subsist;

iv. that there was no term or price provided for each sub-contract; and

v. that it was not clear if there would be any consideration given for the sale of the future contracts.

[131] Hence, the imposition of an obligation to set up a trust account for the benefit of the respondent as provided for under cl. 10 was ruled to be no longer arising since the provision relating to 'future contracts' was ruled to be void for uncertainty as it did not meet the requirement of s. 30 of the Contracts Act 1950.

[132] On appeal to the Court of Appeal the finding of the High Court Judge was reversed. The Court of Appeal was of the view that cl. 9.5 of the Restructure Sale Agreement created an express trust and that s. 30 of the Contracts Act 1950 did not apply. On the requirement of the three certainties in the creation of an express trust his Lordship Gopal Sri Ram JCA said this:

> There are two points that arise out of this head of the plaintiff's claim. The first concerns the grounds on which the learned judge rejected it, namely that it is flawed by uncertainty and by the want of consideration. Second, there is the reason advanced by the

defendant, in addition to those given by the judge, namely, that the basis for the claim simply does not exist. I will deal with the latter first. But, some background is necessary. A

This part of the plaintiff's claim is directed at the second concession agreement. It is the plaintiff's case that the second concession agreement is a 'future contract' within cl. 9.4. The restructure sale agreement in cl. 1.1 defines 'future contract' as any contract relating to any project or the construction of any works entered into or to be entered into with the Datuk Bandar Kuala Lumpur or any other person, other than such projects or works relating to the first concession agreement. B C

Much time and effort has been spent in oral and written argument on the learned judge's finding that cl 9.4 was void for uncertainty as a matter of contract by virtue of s 30 of the Contracts Act 1950. With respect, I think that the target has once again been missed. Look at cl. 9.5 again and see what it actually does. It creates an express trust. The actual words it uses are 'the future contracts shall be held by the vendor on trust for the purchaser (Emphasis added). Once an express trust is created, there is no role for the law of contract. The real question or target that ought to have been addressed in the submissions of counsel before the High Court should have been whether the trust created under c 9.5 is certain. And upon that question s. 30 which only applies to contracts has no relevance whatsoever. D E

The law governing the certainty of a trust is that laid down by Lord Langdale MR in the seminal case of *Knight v. Knight* [1840] 49 ER 68. There it was held that for a trust to be certain three requirements must be fulfilled. First, there must be certainty of intention. Second there must be certainty of subject matter: both in terms of the corpus and the beneficial interest. Third, there must be certainty of the objects of the trust. A trust is void if there is uncertainty in any of these three elements. F G

In my judgment, on the facts of the present case the first and third requirements are amply satisfied. Let me take the first requirement. The words 'shall be held by the vendor on trust for the purchaser' are imperative, not precatory. They establish beyond a reasonable doubt an intention on the part of the defendant (described as 'the vendor' in cl 9.5) that it shall be constituted a trustee for the plaintiff (see *Hameeda Bee v. Mrs P Seenivasagam* [1950] MLJ 267). H

... I

A After very careful consideration of the terms of the restructure sale agreement, I have come to the conclusion that the trust created under cl. 9.5 is not void for uncertainty. My reasons are these. In the first place, the subject matter of the trust is clearly identified by the restructure sale agreement itself. As I have already said, cl. 1.1 clearly defines what a future contract is. At the risk of repetition, it says that 'future contract' means 'any contract relating to any project or the construction of any works entered into or to be entered into with the Datuk Bandar Kuala Lumpur or any other person, other than such projects or works relating to the first concession agreement'. So, if and when the C defendant secures a contract with DBKL or any other person for a project, that contract is immediately charged with a trust. I cannot therefore see how much more clearly trust property may be identified. In the second place, the defendant had a contingent, and I would venture to even say a vested, right to secure a contract with DBKL in the form of the second concession.

[133] Hence, Question 1 in its present form was allowed at the leave stage premised on the impugned main judgment of the Court of Appeal. Anyway as indicated earlier on learned counsel for the respondent took the position that this Question 1 should be E considered on its own even if we have answered Question 3 in the affirmative.

[134] However, in view of our answer to Question 3 and our decision to set aside the main and supplementary judgments of the F Court of Appeal it is thus essential that we should review the decision of the learned High Court Judge on the issue of trust *vis-à-vis* the claim of the respondent.

[135] Relying on cls. 9 and 10 of the Restructure Sale G Agreement it is the case for the respondent as prayed for that the appellant 'holds the said profits, monies and benefits received and to be received on trust for the benefit of the respondent under the new Concession Agreement and the said contracts'.

[136] Although the learned High Court Judge might have erred H in applying s. 30 of the Contracts Act 1950 when considering cls. 9.5 and 10 of the Restructure Sale Agreement in term of certainty, we are of the view in the same way as the Court of Appeal that determining the elements of certainty in the purported trust created by those clauses is still necessary. Essentially therefore it I is an exercise to determine whether all the three elements of certainties in the creation of an express trust, namely, intention, subject matter and object, are present.

[137] Certainty of intention is clear from the words of the cl. 9.5 and so too the object being the respondent. It is the subject matter of the purported express trust that poses some difficulties.

[138] 'Future contracts' has been defined in cl. 1.1 of the Restructure Sale Agreement as 'any contract relating to any project or the construction of any works entered into or to be entered into with the Dato Bandar Kuala Lumpur or any other person, **other than such projects or works relating to the first Concession Agreement**'. (emphasis added).

[139] It is the pleaded case of the respondent that the Replacement Concession Agreement is a replacement of the First Concession Agreement. In fact the recital as well as cl. 1.4 of the Replacement Concession Agreement is clear in that it is a replacement or substitution for the First Concession Agreement.

[140] If therefore the Replacement Concession Agreement is a replacement of the First Concession Agreement there is merit in the submission that projects or works relating to it could be excluded due to the definition of 'future contracts' as given. As the subject matter of the intended trust are the 'future contracts' but that the projects or works relating to the Replacement Concession Agreement are not within the definition of 'future contracts', it follows that there is no question of the Replacement Concession Agreement being the subject matter of the trust upon which the respondent premised its claim against the appellant.

[141] Accordingly we would say that the learned High Court Judge was right in concluding that there was no basis for the claim under cl. 9 of the Restructure Sale Agreement.

[142] Further, due to the uncertainty of what projects and works should come under the purported trust there is therefore uncertainty in the subject matter of the trust. This doubt is not helped by the assertion of learned counsel for the respondent in answer to a question from the Bench that the Replacement Concession Agreement is not a replacement for the First Concession Agreement. Such contention gives the impression that the Replacement Concession Agreement is within the definition of 'future contracts'. That seems to be also the view of the Court of Appeal in its main judgment. Yet at the same time it was also submitted that the trust was created in 'consideration of the

respondent taking over all the liabilities and indemnities of STKG (now the appellant) in relation, to its non-concession business,' and other liabilities and warranty. It was also submitted that cls. 9.4 and 9.5 were 'created merely to ensure that STKG's status as a one project company would not be jeopardized by the influx of future non-toll business, which will instead be transferred to the respondent.' This last preceding statement may be correct if not for the definition of 'future contracts' which only excluded projects and works relating to the First Concession Agreement.

[143] There is therefore confusion as to what actually the respondent is claiming under the purported express trust. If indeed the Replacement Concession Agreement is within the definition of 'future contracts' then there is merit to say that the appellant not only would be obliged to subcontract to the respondent all the projects and works under the Replacement Concession Agreement but it would also be holding on trust all profits and monies received by it in relation to the Replacement Concession Agreement. That in our view makes no business sense at all. It would tantamount to the appellant spending its own capital to generate incomes only to be subject to an express trust in favour of the respondent. There is therefore merit to the assertion that it amounts to an enslavement of the appellant.

[144] There is therefore ambiguity in the subject matter of the purported express trust intended under cl. 9.5 of the Restructure Sale Agreement and is thus void for uncertainty.

[145] For the above reasons it is thus unnecessary to answer Question 1.

[146] At any rate accepting the argument that the Replacement Concession Agreement comes within the definition of 'future contracts' the actual result of the purported express trust would tantamount to nothing less than depletion of the share capital of the appellant since it is expected at its own costs to get the projects and works under the Replacement Concession Agreement and subcontract them to the respondent and that all profits and monies received in relation to the Replacement Concession Agreement would be held on trust for the respondent. Nothing would be earned by the appellant. In our cursory view such purported express trust would obviously be a scheme that could amount to an illegal reduction of capital without any court's

sanction and the payment of profits without declaring any dividend. Sections 64 and 365(1) of the Companies Act 1965, as amended, make clear the prohibitions and the prerequisites and are thus relevant. If on the facts and circumstances of this matter as canvassed our answer to Question 1 would therefore be in the affirmative.

Conclusion

[147] For completeness we would therefore make the following orders, namely:

a. that the main and supplementary judgments of the Court of Appeal cannot stand the test of real danger of bias. We would therefore answer Question 3 as posed in the affirmative. The consequence is that the main and supplementary judgments of the Court of Appeal are set aside. It follows that the decision of the Court of Appeal is therefore set aside;

b. that our answer to Question 2 is in the negative. The respondent would not be able to claim the sum computed in accordance with the formulae given in cl. 8 of the Signage Sub-Licence Agreement as amended by the Signage Sub-Licence Amendment Agreement. However, 'there shall be an order that damages be assessed in respect of the loss suffered' by the respondent 'to take account of and for the duration of the Replacement Concession Agreement any advertising rights that may have been granted' under such agreement which the appellant 'signed within the ambit of cl. 1.4 of the Signage Sub-Licence Agreement';

c. that the claim pursuant to cls. 9 and 10 of the Restructure Sale Agreement is dismissed. Further and if necessary our answer to Question 1 is in the affirmative; and

d. half costs to the appellant here and below since the appeal is only partially allowed. Deposit to be refunded to the appellant.

[148] My learned brothers, the Chief Justice and Abdul Hamid Mohamad, Alauddin Mohd. Sheriff and Nik Hashim Nik Abd Rahman FCJJ have read this judgment in draft and have expressed their agreement with it.

A **Abdul Hamid Mohamad FCJ:**

[149] It started with Fawziah Holdings Sdn. Bhd. ("Fawziah Holdings") suing Metramac Corporation Sdn. Bhd. ("Metramac Corporation") principally for damages for breach of contract in the
B High Court of Kuala Lumpur (Commercial Division) in Civil Suit no. D5-22-110-1995. The High Court allowed part of the claim of Fawziah Holdings and dismissed the others. Both Fawziah Holdings and Metramac Corporation appealed against the High Court judgment to the Court of Appeal. Fawziah Holdings' appeal
C was registered as Civil Appeal No. W-02-1009-2003. Metramac Corporation's appeal was registered as Civil Appeal No. W-02-1013-2003.

[150] The Court of Appeal allowed Fawziah Holdings' appeal but
D dismissed Metramac Corporation's appeal. Metramac Corporation applied for leave to appeal to this Court against both the judgments. The application arising from W-02-1009-2003 was registered as 08-8-2006(W) while the application arising from W-02-1013-2003 was registered as 08-9-2006(W). Leaves to appeal
E were granted. Metramac Corporation then filed the notices of appeal which were registered as 02-19-2006(W) and 02-20-2006(W) respectively.

[151] The judgment of the Court of Appeal ([2006]1 MLJ 505; [2006] 1 CLJ 996; [2006] 2 AMR 1), in particular, the judgment
F of Gopal Sri Ram JCA contained statements against Tun Daim and Tan Sri Halim Saad which they found to be objectionable. Tun Daim and Tan Sri Halim Saad were neither parties nor witnesses in the suit in the High Court or in the appeals in the Court of Appeal. They each filed an application to intervene in
G Metramac Corporation's applications for leave to appeal (08-8-2006(W) and 08-9-2006(W)) and to have the offensive statements expunged. Tun Daim's application in 08-8-2006(W) is in encl. 9(a) while his application in 08-9-2006(W) is in encl. 7(a). Both are the same.

H

[152] Tan Sri Halim Saad made a similar application in 08-8-2006(W), in encl. 13(a).

[153] This court on 7 March 2006 granted both Tun Daim and
I Tan Sri Halim Saad leave to intervene in the appeals for the purpose of expunging the alleged offensive statements. The main prayers in their applications, ie, to expunge the allegedly offensive

statements were fixed for hearing together with the hearing of the appeals by Metramac Corporation (02-19-2006(W) and 02-20-2006(W)).

[154] In the mean time, Tun Daim applied to have encls. 7(a) amended and to have some documents exhibited in Fawziah Holdings' affidavits expunged – encl. 30(a). Similar application was made by him in respect of encl. 9(a) – encl. 55(a). Tan Sri Halim Saad also made an application to expunge the same documents. His application is in encl. 81(a).

[155] As we had sorted out the side issues without having to make decisions and orders, I do not think that it is necessary to say anything about them. I shall go straight to the main issue ie, that of expunging the allegedly offensive statements.

Jurisdiction Of The Court

[156] Actually, jurisdiction of this court to make an order to expunge offensive statements is not an issue before us. First, this court in allowing Tun Daim and Tan Sri Halim Saad ("the interveners") to intervene in these appeals for that purpose, was already satisfied that this court had the threshold jurisdiction to make such an order.

[157] Secondly, this court has repeatedly held that it has the inherent jurisdiction "to make any order that may be necessary to prevent injustice or to prevent any abuse of the process of the court" – see *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61; *Megat Najmuddin bin Dato' Seri (Dr.) Megat Khas v. Bank Bumiputra (M) Bhd.* [2002] 1 CLJ 645; *MGG Pillai v. Tan Chee Yionn* [2002] 3 CLJ 577 and *Allied Capital Sdn. Bhd. v. Mohd. Latiff bin Shah Mohd. & Another Application* [2004] 4 CLJ 350.

[158] Thirdly, at least on two occasions, courts in this country had expunged remarks made in a judgment. The first is *Insas Bhd. & Anor v. Ayer Molek Rubber Co. Bhd. & Ors.* [1995] 3 CLJ 328 (FC). The other case is *Phileo Promenade Sdn. Bhd. & Anor v. Premier Modal (M) Sdn. Bhd.* [2003] 1 CLJ 854 (CA).

[159] In *Insas Berhad* or better known as the "Ayer Molek Case" the Federal Court expunged offensive remarks made by the Court of Appeal in its judgment against the High Court, the applicants and their counsel. Jurisdiction was not an issue in that case and the Federal Court did not even make any mention of it.

[160] In *Phileo Promenade (supra)*, the Court of Appeal expunged three paragraphs from the judgment of the High Court. In that case too, jurisdiction of the court, ie, the Court of Appeal, was not an issue and no mention was made in the judgment of the Court of Appeal on the question of jurisdiction. It was accepted by all that the court had the jurisdiction to do so.

[161] Fourthly, in this case too, learned counsel for Fawziah Holdings (the respondent) did not raise any objection to the application on ground of want of jurisdiction. It was only the learned counsel for the interveners who, out of caution, submitted on the question of jurisdiction of this court to make the expunging order.

[162] The Supreme Court of India too has on occasion exercised its inherent jurisdiction to expunge comments of the lower courts. An example is the case of *State of Uttar Pradesh v. Mohd. Naim* [1964] AIR SC 703. That case was also cited in *Insas Bhd. (supra)* and *Phileo Promenade (supra)*.

[163] In the circumstances, I do not think it is necessary to dwell at length on the issue of jurisdiction of this court to make the expunging order. Suffice to say that this court has the jurisdiction to do so, if circumstances warrant it to do so.

The Test

[164] A number of judgments of the Supreme Court of India were referred to us. They are *State of Uttar Pradesh v. Mohd. Naim (supra)*, *A.M. Mathur v. Pramod Kumar Gupta & Ors* [1990] 2 SCC 533; *State of Madhya Pradesh & Ors. v. Nandlal Jaiswal & Ors* [1987] 1 SCR1; *V. Sujatha v. State of Kerala & Ors.* [1994] Supp (3) SCC 436. In fact passages from the same cases have been reproduced in the judgments of this court in *Insas Berhad (supra)* and in the judgment of the Court of Appeal in *Phileo Promenade (supra)*. I do not think it is necessary to reproduce them again. These cases talk about the need for judicial restraint, remind judges not to misuse their authority by intemperate comments, undignified banter or scathing criticism of counsel, parties and witnesses, advise judges "not to use strong and carping language while criticising the conduct of parties and witnesses. They (judges – added) must have the humility to recognise that they are not infallible and any harsh and disparaging strictures

passed by them against any party may be mistaken and unjustified and if so, they may do considerable harm and mischief and resulting in injustice" – per B.N. Bhagwati CJ.

[165] In *State of Uttar Pradesh v. Mohd. Naim (supra)* S.K. Das J, delivering the judgment of the court said that in such cases "it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct".

[166] I agree that the sensible approach for this court to take is first to consider whether the statements, on the face of it, are offensive, objectionable, disparaging, unjust, unjustified and so on. If so, then the court should consider the three points mentioned above. However, there may be other factors arising from the circumstances of the case that may be relevant.

[167] So, we have to look at the statements that have become the subject matter of this application. Both Tun Daim and Tan Sri Abdul Halim Saad have reproduced the parts of the judgments objected to by them in their affidavits in support of their respective application. They are too long to be reproduced. Suffice for me to identify them by their paragraph numbers. They are paras 11, 13, 16 and 34 of the judgment of Gopal Sri Ram JCA and para 35 of the judgment of Zulkefli Ahmad Makinudin JCA.

[168] Tan Sri Halim Saad objected to paragraphs (at times part of) 10, 11, 12, 13, 15, 16, 17, 18 and 34 of the judgment of Gopal Sri Ram JCA and part of para 32 of the judgment of Zulkifli Ahmad Makinudin JCA.

[169] We have before us a case where the unwarranted and disparaging statements were made by the learned judge in his judgment where Tun Daim was neither a party nor a witness; where he had no opportunity whatsoever to explain or defend himself; where there was no cogent evidence on record to support such statements; where he was neither referred to in the pleadings nor in the judgment of the trial judge; where in the notes of evidence of the trial judge even though his name was mentioned

A it was inconsequential and where such comments are altogether unnecessary for the learned judge to decide the case, even to arrive at the same conclusion that he did.

[170] Reading those parts of the judgment objected to I have no B doubt that, at least some of them are unwarranted and objectionable and should be expunged from the records.

[171] The same applies to Tan Sri Halim Saad's application.

[172] In my judgment, the following statements from the C judgment of Gopal Sri Ram (JCA) should be expunged:

Para. 13

> So why pay RM97.5 million for the shares of such a company? The answer is simple enough. Anuar Othman and Dato Halim D Saad had something which the plaintiff did not. And that was the patronage of the then Minister of Finance, Tun Daim Zainuddin. The events leading to the takeover of the defendant company and subsequent thereto clearly bear this out. For example, look at the confident way in which Metro Juara behaved. Even before the E restructure sale agreement was signed on 23 January 1991, Metro Juara wrote to DBKL on 14 January 1991 about recommencing toll collection and re-negotiating the first concession agreement. It would not have written such a letter unless everything had already been put in place.

F **Para. 16**

> You may well ask how all this could have happened without the direct involvement of Tun Daim. It is also incomprehensible why the defendant as it was constituted immediately before the takeover by Metro Juara was not given this same financial support by the G Federal Government. After all, at least two of the pre-takeover shareholders were either Government concerns or Government assisted concerns. And in the case of Tabung Haji, the ultimate beneficiaries would have been the poorer section of our society. I think that it is a fair question to ask why taxpayers' money was H channelled into the hands of two private individuals – to profit them – instead of a wider section of the general public. It is not at all clear why the Minister for Finance used his power to favour Anuar Othman and Dato Halim Saad.

I

Para 17

17. For the sake of completeness, it must be mentioned that the RM 32.5 million mentioned earlier was siphoned out of the defendant's account by Anuar Othman and Dato Halim Saad. I asked learned counsel for the defendant during argument how this ever could have happened. His reply was stupefying. He said that these two gentlemen had, as shareholders, paid this sum into the defendant's account and were now reimbursing themselves. This answer overlooks the most elementary principle of company law. It is this. The shareholders of a company have no interest, legal or equitable, in the assets of their company. See, *Law Kam Loy v. Boltex Sdn Bhd* [2005] 3 CLJ 355.

Para 18

18. In this context, it is clearly wrong to treat even a private limited company with only two shareholders any different from any other company. An intentional misappropriation of such a company's property, movable or immoveable is a criminal breach of trust within section 405 of the Penal Code and, if the misappropriation is done by directors, as was the case here, it is the aggravated form of criminal breach of trust under section 409. See, *Public Prosecutor v. Datuk Harun* [1977] 1 MLJ 180. I need do no more than quote from the judgment of Chua J in *Tay Choo Wah v. Public Prosecutor* [1976] 2 MLJ 95 where his lordship said:

> The sooner directors realise that *the Companies Act applies to private companies whether family or not* the better it is. *A company is not a mere puppet of the directors and the people interested in the proper and lawful conduct of the company are not just the directors and the shareholders.* All sorts of people have a legitimate and proper interest in the well-being and preservation of the assets and properties of a company, like creditors and persons having dealings with the company. (emphasis added.)

I must therefore be forgiven if I were to look askance at learned counsel's rationale for what was done in this case.

Para. 34

They are the ones who, with the support of Tun Daim, oppressed the previous shareholders into parting with their shares. They are the ones who took advantage of all the ideas of Dato' Fawziah and used it for their benefit and obtained huge payments from DBKL and the Federal Government. It is now scarcely open to them to point fingers at the plaintiff.

[173] No part of the judgment of Zulkifli Ahmad Makinudin JCA needs be expunged.

Costs

[174] The question is, since I am allowing the application to expunge, whether Fawziah Holdings should be penalized with costs of the interveners who, through no fault of theirs, have to incur expenses to intervene in the appeals. On the face of it, it is only fair that they be given their costs. But, to order that Fawziah Holdings pay their costs, there must be some "fault" on the part of Fawziah Holdings. At the very least, it should be shown that Fawziah Holdings in prosecuting their appeal, had led the learned judge to make those objectionable statements that he had made. I do not think it is fair to penalize Fawziah Holdings with costs if the learned judge, on a frolic of his own, had made those objectionable statements. What part had Fawziah Holdings played in this episode?

[175] I have read the excerpts of Fawziah Holdings' Final Submission and reply in the Court of Appeal which the interveners rely as forming the basis for the learned judge to make the impunged statements. To me the mention of the interveners' names in the contexts are a matter of fact and inconsequential. In no way they can be said to have caused the learned judge to make such comments. What happened here was that the learned judge had gone on a frolic of his own to do so.

[176] It is true that Fawziah Holdings had objected to the applications of the interveners to intervene and had argued against expunging. Their actions is understandable and quite reasonable because it is an attack on a judgment which was in their favour and that they feared of having "a cut-up" judgment to defend. In any event, even if Fawziah Holdings did not object to the applications, the interveners would have to engage solicitors and counsel and incur legal expenses all the same. It is unfair to the interveners that they have to bear their own costs of making these applications. It is also unfair that Fawziah Holdings have to bear their own costs of defending the judgment of the learned judge. It is even more unfair to make Fawziah Holdings bear the costs of the interveners. All these only reemphasize the serious consequences statements from the bench can have. That is a lesson that all judges should learn.

[177] In conclusion, I would allow these applications and expunge the parts of the judgment of Gopal Sri Ram JCA reproduced earlier. I would make no order as to costs and I would order that the deposits to be refunded to the interveners.

[178] The learned Chief Justice Malaysia, Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim, the learned Chief Judge (Sabah and Sarawak) Tan Sri Dato' Richard Malanjum, and my learned brothers Dato' Alauddin bin Dato' Mohd. Sheriff, FCJ and Dato' Nik Hashim bin Nik Ab.Rahman, FCJ have read this judgment and have agreed with it.